

# Consent, Culpability, and the Law of Rape

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Our conception of sexual assault is undergoing a transformation. The most critical shift is the move away from force as a necessary element of rape and toward the view that sex without consent is itself a serious crime. As Deborah Tuerkheimer notes, the prevalent view is that “it is virtually axiomatic that nonconsensual sex is rape; the challenge outstanding is to define consent.”<sup>1</sup> Although only some states currently adopt a requirement of affirmative consent<sup>2</sup>—that the consentor must say “yes” by words or conduct—it is reasonable to predict future adoptions for two reasons. First, as colleges and universities are required under Title IX to promulgate sexual assault regulations, these institutions seem particularly tempted by affirmative consent standards.<sup>3</sup> Indeed, over 800 colleges and universities have adopted affirmative consent provisions.<sup>4</sup>

Second, affirmative consent standards are advocated for not just by ivory tower scholars. These standards are also under consideration as part of the revised Model Penal Code. The Model Penal Code, arguably one of the most influential and successful law reform efforts, has one significant blemish: its sexual assault provisions—provisions which include a marital rape exemption and adopt a gendered view of rape.<sup>5</sup> The American Law Institute now has a group working on

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<sup>1</sup> Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 3 (2015); see also MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 17 (AM. LAW. INST., Discussion Draft No. 2, 2015) (“the evolution of reform toward a more consent-based conception of the offense has been unmistakable, not only in the United States but throughout the world.”).

<sup>2</sup> E.g., VT. STAT. ANN. tit. 13, § 3251(3) (2005) (“‘Consent’ means words or actions by a person indicating a *voluntary agreement* to engage in a sexual act.”) (emphasis added); State *ex rel* M.T.S., 609 A.2d 1266, 1277 (N.J. 1992).

<sup>3</sup> E.g., OFFICE OF POLICY AND EFFICIENCY, UNIV. OF COLORADO, APS 5014 SEXUAL MISCONDUCT <http://www.cu.edu/oape/aps/5014> (Effective July 1, 2015) (“Consent is clear, knowing and voluntary words or actions which create mutually understandable clear permission regarding willingness to engage in, and the conditions of, sexual activity. Consent must be active; silence by itself cannot be interpreted as consent.”).

<sup>4</sup> Jake New, *The “Yes Means Yes” World*, SLATE (Oct. 17, 2014), [http://www.slate.com/articles/life/inside\\_higher\\_ed/2014/10/affirmative\\_consent\\_what\\_will\\_yes\\_means\\_yes\\_me\\_an\\_for\\_sex\\_on\\_college\\_campuses.html](http://www.slate.com/articles/life/inside_higher_ed/2014/10/affirmative_consent_what_will_yes_means_yes_me_an_for_sex_on_college_campuses.html).

<sup>5</sup> See Deborah W. Denno, *Why the Model Penal Code’s Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 210–13 (2003).

substantially revising the Model Penal Code's sexual assault provisions,<sup>6</sup> and, the definition and role of consent are among the central topics under consideration.<sup>7</sup>

The “women say ‘no’ when they mean ‘yes’” trope is as tired as it is familiar. That said, the relationship between different conceptions of consent and different assessments of the defendant's culpability remains an important one. If the criminal law is going to label someone a criminal and potentially incarcerate her, and if universities are going to expel their students for sexual assault, it is essential that the interplay between conceptions of consent and the accused's blameworthiness be fully examined.<sup>8</sup>

This Article seeks to explore the relationship between consent and culpability. The goal is to present a thorough exposition of the tradeoffs at play when the law adopts different conceptions of consent. Part I begins by describing the relationship between culpability, wrongdoing, permissibility, and consent. It then argues that the best conception of consent—one that reflects what consent really is—is the conception of willed acquiescence. That is, an internal choice to allow contact—a decision that “this is okay with me”—is all that is morally required for one person to contact another. Part I further maintains that an expression of consent is not necessary to capture those culpable actors who proceed when they do not believe that they have consent, as attempt liability remains available. Culpable actors can be captured without altering the conception of consent to do so. Finally, although Part I endorses consent as willed acquiescence, Part I sets forth alternative conceptions of consent. As will be seen in later Parts, most conceptions of what consent is are inconsistent with affirmative consent formulations.

Part II discusses a defendant-protecting motive for shifting to expressive standards for consent. However, to the extent this move is thought to be defendant-protecting, as it authorizes contact based on reasonable appearances, this goal can be accomplished with *mens rea* provisions. Requiring an external manifestation is unnecessary.

Part III then turns to the current victim-protecting impetus for affirmative expression standards, specifically, requirements that the victim by words or conduct *said* “yes” or “no.” Part III argues that affirmative expression standards suppress the underlying moral question in favor of a new rule that commentators wish the populace to follow. This transition means that a defendant who

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<sup>6</sup> See *Model Penal Code: Sexual Assault and Related Offenses*, AM. LAW INST., <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/> (last visited Mar. 17, 2016).

<sup>7</sup> Under one version of the proposed provisions, sex in the face of refusal is a third-degree felony and sex without an affirmative “yes” (by words or conduct) is a misdemeanor. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 2 (AM. LAW. INST., Discussion Draft No. 2, 2015) (setting forth proposed § 213.2).

<sup>8</sup> Certainly these are different sanctions by very different institutions and should be treated as such. I return to whether colleges are different in Part VI. However, the first question is what consent *is*, and that question does not differ between the two.

reasonably believed the victim acquiesced will still be guilty of sexual assault—all the defendant will be permitted to argue about is whether the victim’s behavior constituted the required expression. This could lead to strict liability, as it allows for the possibility of condemning someone who did not do anything morally culpable. Part III also notes that, at best, affirmative expression standards could be construed as adopting negligence per se rules; however, negligence liability is rare for serious crimes. Finally, it argues that “only yes means yes” standards threaten to blur the line between consent and requests, ultimately employing the criminal law in the service of promoting virtuous or ideal conduct rather than simply prohibiting wrongful conduct.

Part IV addresses questions about placing affirmative expression requirements into a criminal code. It argues that “no means no” standards are under-inclusive and that “only yes means yes” standards, so long as they allow conduct to count as affirmative consent, will fail to protect victims or give guidance to potential defendants. Conduct is simply too ambiguous. Part IV then raises problems with grading and distinguishing offenses. Specifically, under affirmative expression models, knowing and negligent actors appear to violate the same law. Not only does this mean that the criminal law will necessarily over or under punish one group, but it also yields that both types of actors are treated as equally culpable. Such a code fails to distinguish actors according to their blameworthiness and to punish them proportionately. Finally, this Part suggests the compromise solution of an affirmative defense when the defendant honestly (and/or reasonably) believes there is willed acquiescence.

Finally, Part V addresses the applicability of affirmative consent standards to colleges and universities. Although these institutions’ reforms may be able to avoid some of the problems of criminal law, Part V argues that colleges must solve the “intoxicated yes” problem, a problem that will exist even under affirmative consent requirements.

## I. WHAT IS CONSENT?

### A. *Some Terminological Preliminaries*

Let me begin by ensuring that we are all on the same terminological page. Initially, it is important to distinguish between wrongdoing and culpability. Take, for example, the simple case of a person who purposefully kills another. We can say two things here: First, the defendant engaged in a wrongful action (killing another person).<sup>9</sup> Second, the defendant was culpable (he acted purposefully).<sup>10</sup>

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<sup>9</sup> Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551, 1558 (1999) (“Moral wrongdoing consists of doing an action that violates the maxims of our best moral theory—whatever that theory may be, be it consequentialist or deontological.”).

Importantly, wrongdoing and culpability can come apart. A defendant who accidentally runs over another may engage in wrongdoing, but is not culpable. In these instances, unless the criminal law allows for strict liability, the defendant will not be guilty of a crime. In contrast, the criminal law will punish culpability without wrongdoing. If the defendant, with the intent to kill, shoots someone, but it turns out the person is already dead, the defendant may still be punished for attempted murder. The defendant did not commit the wrong of killing another human being, but she is still culpable.

Another terminological clarification is necessary, and it concerns the meaning of the word, “permissibility.” One might think that permissibility tracks either culpability or wrongdoing.<sup>11</sup> I believe that permissibility should track wrongdoing; that is, permissibility should depend on the underlying act’s nature and quality and not the defendant’s culpability. It is rare that a mental state affects whether the action is or is not permissible.<sup>12</sup> But one need not accept my claim here. The debate over which aspect of the defendant’s conduct the word “permissibility” applies to is something we need not resolve for purposes of this Article. If you think permissibility tracks culpability, then you will take culpable actions to be impermissible, but nothing turns on the disagreement as to what “permissibility” applies to. I take it that culpability is sufficient for punishment and wrongdoing is not. Thus, even if I claim that an act is permissible because it is not wrongdoing, I do not imply that the defendant is not still culpable, blameworthy, and punishable. Indeed, in my view, the criminal law ought to punish attempts at the same level as completed crimes.<sup>13</sup> Hopefully, this clarifies for the reader what is *and is not* at stake when I claim an act is permissible.

With this exposition in mind, then, we can consider the normative force of consent. Here’s a first pass: Consent takes an action that was wrongful, and renders it not wrongful because it no longer violates the consentor’s rights. Now, that is slightly oversimplistic because the action might still be wrongful for other reasons. For example, it might be wrongful because it violates a third person’s rights. A man who has consensual sex with his mistress has not committed rape,

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<sup>10</sup> *Id.* (“Moral culpability consists in intending to do an action that is wrongful, knowing that one will do an action that is wrongful, or failing to infer from available evidence that one will do an action that is wrongful.”).

<sup>11</sup> Hurd places permissible within the category of “right action.” *Id.* at 1560 n.25. Alan Wertheimer, in contrast, appears to think that an action is not permissible because the actor is legally or morally culpable. See ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 146–47 (2003).

<sup>12</sup> See LARRY ALEXANDER AND KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 92–93, 97 (2009) (suggesting that self-defense may require knowledge of the attack but rejecting the Doctrine of Double Effect).

<sup>13</sup> *Id.* at 171 (providing arguments for why attempts are not less blameworthy than completed offenses).

but he has still committed adultery and therefore has acted wrongfully.<sup>14</sup> Importantly, his action does not wrong his mistress since it does not violate her rights. If a boxer consents to being punched by another boxer, he still has suffered the harm of a bloody nose, a harm that the consentee boxer must still take into account.<sup>15</sup> But I am unconcerned with special cases here. All I will focus on is the permissibility/non-wrongfulness of sexual relations when Joe consents to sex with Suzie, and Suzie consents to sex with Joe.<sup>16</sup> *Ceteris paribus*, consent renders that contact non-wrongful when it was previously wrongful. The relevant question is, “What is consent?”

### B. *The Ontology of Consent*

In asking how to formulate consent in a statute, we must first ask what consent *is*. Even if we determine that consent is a mental act that need not be expressed, the law might opt for prophylactic rules that require an expression because these rules might serve as victim-protecting or defendant-protecting proxies. For instance, a rule that forbids sex with a minor under 16 is using age as a proxy for incapacity, rather than assessing capacity directly. Here, we need to know exactly what consent is, and we can then ask (1) whether we want to define it legally as something other than what it is and (2) what interests are at stake in opting for an alternative legal definition.

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<sup>14</sup> Heidi M. Hurd, *The Normative Force of Consent*, in ROUTLEDGE HANDBOOK ON THE ETHICS OF CONSENT (Peter Schaber ed., forthcoming 2016).

<sup>15</sup> That is, even if left unprotected by a right, there is still a residual harm. Cf. HELEN FROWE, DEFENSIVE KILLING 209 (2014) (arguing that in the self-defense context, even when aggressors forfeit rights, harm to them must be taken into account).

<sup>16</sup> Michelle Madden Dempsey and Jonathan Herring argue that sexual intercourse requires not only consent but also some positive reasons that outweigh the risks and injuries of sexual intercourse (ranging from disease, to pregnancy, to physical injury inherent in vaginal intercourse). Michelle Madden Dempsey and Jonathan Herring, *Why Sexual Penetration Requires Justification*, 27 OXFORD J. LEGAL STUD. 467, 467–69 (2007). This would not require requests but might require that the putative defendant’s pleasure, the relationship’s stability, and other goods outweigh the minor physical injuries and the risk of pregnancy and disease. That is, although consent can drop the wrongfulness that comes from violating the person’s autonomy, further good reasons are needed to justify the harm or risk of harms. To them, sex is like the boxing example. Two points. First, once there is consent to the sex act, then the question is simply whether these physical injuries are justified. This is arguably covered by MODEL PENAL CODE § 2.11(2)(a) (AM. LAW INST. 2015); that is, it ought to then be evaluated on terms of whether one can consent to other sorts of physical harms where we answer “yes” to boxing and “no” to some amputations. Second, within the realm of average risks, we might simply think that when there is consent it is too invasive for the law to do an all-things-considered justification analysis unless there is force that extends beyond that inherent in sexual intercourse. Cf. Vera Bergelson, *The Meaning of Consent*, 12 OHIO ST. J. CRIM. L. 171, 178 (2014) (arguing that because sex is morally neutral, “attitudinal” consent is sufficient but maintaining that harms that require a justification (such as homicide or battery) also require knowledge of the justifying circumstances, and such knowledge implicitly requires that consent be expressed).

Thus, the argument here serves as a key starting point for determining what is at stake with proposed alternative definitions. This Part begins by suggesting that consent *is* an internal mental choice—willed acquiescence, as this is the view that best comports with the consentor’s autonomy. It also argues that this view that is in accord with tort law, and that law reformers, particularly the American Law Institute, should be cognizant of how consent is understood in other domains. This Part then suggests that a performative view is normatively unattractive, and indeed, not the conception that reformers truly adopt. Finally, this section suggests even if consent must be manifested, silence under certain conditions can suffice. Although I find the mental-act view of consent to be most perspicuous, even those tempted by the expressive view will see the way that law reforms threaten to diverge from what consent actually is.

As Peter Westen thoroughly clarifies in his magisterial book, we use the term “consent” to cover different things. We have different conceptions: There is the subjective mental state, which Westen denotes as “factual attitudinal consent,” (hereafter I will refer to it as “willed acquiescence” or “assent”);<sup>17</sup> there is the expression of that state (saying yes—expressing assent);<sup>18</sup> there is the requirement of having or expressing that state under conditions of sufficient freedom (no gun to the head) and information (not mistaken that consentee is husband), such that the assent is normatively transformative;<sup>19</sup> and finally, there are times when we impute consent—where consent to *a* is held to be consent to *b*. Such a position would include not only the infamous marital rape exemption but also claims that consent to play football includes the consent to rough tackling.<sup>20</sup> Although we sometimes use the word “consent” despite the absence of sufficient freedom or information—“she only consented because he put a knife to her throat”—it is arguably preferable to use “assent” for choices or expressions that fall short of being normatively efficacious.<sup>21</sup> Nevertheless, because this Article is unconcerned with conditions that might prevent assent from being effective and thus constituting “consent,” I will use “consent” and “assent” somewhat interchangeably.

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<sup>17</sup> PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* 4 (2004).

<sup>18</sup> Westen dubs this, “factual expressive consent.” *Id.* at 5.

<sup>19</sup> Westen calls this “prescriptive attitudinal” or “expressive consent.” *Id.* at 177.

<sup>20</sup> *Id.* at 271.

<sup>21</sup> Our use of the term “consent” to cover both the acquiescence and that acquiescence plus normative constraints can lead to confusion. Indeed, we might find it more normatively attractive to deny the label of “consent” to anything that falls short of being normatively efficacious. So, for instance, Heidi Hurd claims that “coerced consent is no consent at all.” Heidi M. Hurd, *Was the Frog Prince Sexually Molested? A Review of Peter Westen’s The Logic of Consent*, 103 MICH. L. REV. 1329, 1332 (2005); accord Kenneth W. Simons, *The Conceptual Structure of Consent in Criminal Law*, 9 BUFF. CRIM. L. REV. 577, 585 (2006) (book review).

The starting question of “what consent is,” has three potential answers.<sup>22</sup> First, consent could be what Westen dubs “factual attitudinal consent”—a mental act.<sup>23</sup> Second, consent could be a performative, words or conduct that by their expression, authorize the contact. Third, consent could require both the mental act and some manifestation thereof.

Which conception reflects the ontology of consent? That is, what actually is it? The question is sometimes posed as, “Is consent something you do or something you feel?” This is a somewhat unfair way to present the problem. We do plenty of mental acts. For instance, add two plus two. You can probably do this without expressing anything. Now, decide what type of ice cream you are going to buy at Ben and Jerry’s. No expression needed there. Now decide how long you are going to spend reading this article. Again, an outward manifestation is completely unnecessary. We engage in mental acts all the time. So, the question should not be whether consent is something you *do*. It most certainly is. The question is whether consent needs to be manifested.

What is consent? To start, it is a normative power. Hohfeld nicely unpacked what lawyers take to be “rights” into different sorts of normative relationships. You might have a claim right that I not harm you, to which I then have a correlative duty not to interfere with or touch your body. If one can alter these relations, one is said to have a power. And if one is subject to such alterations, one has a liability.<sup>24</sup> What is at stake with respect to consent is how one exercises a power.<sup>25</sup> Alice has a duty not to touch Betty, and Betty has a right not to be touched. However, if Betty consents to Alice touching her, then Alice does not wrong Betty. Alice has the power to alter her normative relation to Betty by consenting to the contact. Other normative powers include promising and abandonment. Abandonment is the power whereby we relinquish our claim rights to property. Promising is the power by which we create new duties for ourselves and new claims rights in others. One question, then, is whether one can exercise a normative power without any physical manifestation.

Promising best supports a performative model.<sup>26</sup> Promising is an instance where “saying makes it so.” To promise is, by words or conduct, to commit

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<sup>22</sup> See WERTHEIMER, *supra* note 11, at 144 (setting out subjective, performative, and hybrid views).

<sup>23</sup> See WESTEN, *supra* note 17, at 4.

<sup>24</sup> WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED TO JUDICIAL REASONING* 34 (2d ed. 1920).

<sup>25</sup> See J.E. PENNER, *THE IDEA OF PROPERTY LAW* 16 (1997) (“A normative power is the *normative ability or capacity* to change one’s own or another’s normative position by modifying, creating, or destroying rules, rights, duties, or other powers.”).

<sup>26</sup> See Tom Dougherty, *Yes Means Yes: Consent as Communication*, 3 PHIL. & PUB. AFF. 224, 234 (2015) (arguing that consent requires communication because promises do). Dougherty does not seek to reconcile his view with the normative power of abandonment.

oneself to performing the action. An uncommunicated promise is a silent vow, but it does not create a duty that the promisor owes to the promisee.<sup>27</sup>

In contrast, abandonment seems perfectly consistent with a mental act view. As Eduardo Peñalver notes, “[r]ather than understanding this physical separation as an essential component of the legal concept of abandonment, however, it would be more accurate to view the intent unilaterally to terminate rights as definitive of abandonment[.]”<sup>28</sup> Although it is admittedly more difficult to abandon property that is on your own property,<sup>29</sup> the idea that merely by choosing to leave your bicycle unclaimed, you can renounce your rights seems correct. A person who then took “your bike” would not be taking the property of another because you had relinquished your right to it—irrespective of whether you said or did anything to so communicate your abandonment. (If the person believed he was stealing your bike, he might be liable for an attempt. More on that possibility below.) Of course, even if the normative power of abandonment requires only the decision to relinquish one’s rights, the law might adopt prophylactic rules. Indeed, property abandonment is heavily regulated because of evidential concerns. The legal system requires both an intention to abandon and an act of relinquishment.<sup>30</sup>

At this point, the goal of the discussion is simply to argue that the idea of a normative power need not entail a communication. If one thinks that one can abandon without communication, there is no reason one cannot likewise consent in a similar way. To understand consent as a normative power, then, does not require us to understand consent as something that is expressed.

### 1. The Argument that Consent is Willed Acquiescence

To determine whether consent is more like promising or abandonment, the critical inquiry is whether it is the case that one is no longer wronged when one makes an internal decision, or whether that decision needs to be communicated. Our normative powers to promise, abandon, and consent are grounded in our autonomy. “The idea that an agent can intentionally form an obligation through

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<sup>27</sup> Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1620 (2009). One could take the view that silent vows are promises. That would make the case easier for me.

<sup>28</sup> Eduardo Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 197 (2010); see also PENNER, *supra* note 25, at 79 (“Abandonment is a permanent decision not to take advantage of the general duty *in rem* prohibiting interference in respect of a particular thing abandoned.”).

<sup>29</sup> Indeed, the extreme difficulty in abandoning property because you either own the property on which it is placed or someone else does, has led Eduardo Peñalver to conclude that abandonment is quite rare and conveyances are the actual norm. Peñalver, *supra* note 28, at 203. For an alternative perspective, see Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 414–415 (2010).

<sup>30</sup> 1 AM. JUR. 2d, *Abandoned, Lost, and Unclaimed Property* § 10 (2012); *Linscomb v. Goodyear Tire & Rubber Co., Inc.* 199 F.2d 431, 435 (8th Cir. 1952); *Cash v. S. Pac. R.R. Co.*, 123 Cal. App. 3d 974, 978 (1981).



the exercise and expression of her will alone (and not by first transforming the state of affairs around her) comes part and parcel with any plausible conception of an autonomous agent.”<sup>31</sup> The power to promise is necessary to have rich and fulfilling relations with others.<sup>32</sup> The power to abandon is tied to our autonomy. Our lives would be quite encumbered if we could not choose to sever relations with things we no longer wish to have.<sup>33</sup> So, too, we could not lead morally fulfilling lives if we could not choose to allow others to cross our boundaries. It would be a lonely and harsh existence if others could never touch us or our property.<sup>34</sup> As Heidi Hurd eloquently explains:

To be an autonomous moral agent is to have the ability to create and dispel rights and duties. To respect persons as autonomous is thus to recognize them as the givers and takers of permissions and obligations. It is to conceive of them as very powerful moral magicians. By recognizing their capacity for self-legislation—for the creation and dissolution of rules that uniquely concern them—one gives meaning to the historic philosophical claim that persons are free inasmuch as they will their own moral laws. One very powerful means by which persons will their own moral laws—by which they alter the moral landscape for themselves and for others—is by granting or withholding consent to other’s actions.<sup>35</sup>

If we think that what we are protecting is autonomy, then that autonomy is best respected by recognizing that the consentor has it within his or her power to allow the boundary crossing simply by so choosing. No expression is needed. So, if I see my neighbor walking across my lawn to get to the street, and I think “that is okay with me,” then the neighbor does not wrong me even if I never communicate that to him. Similarly, assume that a man is awakened by the woman he had intercourse with the night before performing oral sex on him. When he wakes up he thinks, “this is the best alarm clock ever.” He proceeds to do nothing to indicate his acceptance of this act. At the point at which he decides to allow the act, she does not wrong him because he has assented. His autonomy is fully protected. In

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<sup>31</sup> Seana Valentine Shffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 500 (2008); see also Larry Alexander, *The Ontology of Consent*, 55 ANALYTIC PHIL. 102, 102 (2014) (“If we could not alter our normative situation as consent allows us to do, then there could be no blameless dinner parties, boxing matches, or sex, nor could there be blameless trade of any kind.”).

<sup>32</sup> Cf. Chris Essert, *Legal Powers in Private Law* (Feb. 1, 2016), (unpublished manuscript) (on file with author) (noting that without normative powers, we could only change our rights and duties either by changing non-legal facts or by committing wrongs).

<sup>33</sup> PENNER, *supra* note 25, at 78.

<sup>34</sup> Shffrin, *supra* note 31, at 500.

<sup>35</sup> Hurd, *supra* note 14, at 2.

contrast, if a man woke up and thought “What is going on? I don’t want this!” but was too panicked to say or do anything, then he is wronged. It is the consentor’s act of will, his or her choice that makes the consentee’s actions permissible.<sup>36</sup>

In defending consent’s core to be an act of willed acquiescence, some may challenge, not that consent is some sort of mental act, but its exact nature and content.<sup>37</sup> For the purposes of this Article, I do not think it is necessary to take on the question of whether consent is acquiescence, or a desire state, or some other sort of choice. Certainly, these are important questions to be worked out, but they still reflect an underlying assumption that there is some sort of choosing that is, under adequate conditions of knowledge and freedom, itself sufficient to drop the consentor’s claim right.<sup>38</sup>

The only distinction that is critical for any notion of consent is to distinguish it from a request. A request is not just a permission; it is the communication of an affirmative desire for the act. Consent is just a permission. Allowing my neighbor to walk across my lawn is consent. Inviting my neighbor to my house is a request. Similarly, a man might have unbridled enthusiasm for sexual intercourse or conversely, may merely be accommodating a partner’s request. Although we may think that, as a normative matter, it would be better if all sex were of the former sort, that is not the question. The question is when the criminal law ought to step in. The answer is that the criminal law ought not to play a role in either case. Accordingly, any criminal ought to be wary of any usages that implicitly require enthusiasm, as opposed to allowance.

To this point, I have argued that if consent is derived from our autonomy, then we ought to be able to change the permissibility of the act by an act of will alone. The corollary of this argument is that an individual is not wronged, and does not experience conduct as a wrong, when willed acquiescence is present. Westen illustrates the disparity between the subjective state and the expression thereof with

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<sup>36</sup> Accord Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform, The Sixty-Eighth Cleveland Marshall Fund Lecture*, 46 CLEV. ST. L. REV. 409, 424 (1998) (“If a female ‘concur[s] in mind and spirit’ with the act of intercourse, her interest in autonomy has not been violated. The attendant social harm of rape is absent.”) (citations omitted).

<sup>37</sup> Cf. Douglas N. Husak & George C. Thomas III, *Rapes Without Rapists: Consent and Reasonable Mistake*, 11 PHIL. ISSUES 86, 90 (2001) (“The foremost challenge in defending a mentalistic conception is to identify the exact state of mind that consent is.”).

<sup>38</sup> Larry Alexander has a point when he maintains that acquiescence may be too weak in that one may acquiesce to conduct to which one objects but one knows one cannot stop. Alexander, *supra* note 31, at 108. He offers “waiving one’s right to object.” *Id.* My only worry about Alexander’s formulation is that people often don’t take Hohfeldian relations to be the object of their intentions. They simply think, “this is okay with me.” They choose to allow it. But if we understand that that is the shift in normative relations we are after, we can work out the semantic details later.

the cases of Burnham and Bink.<sup>39</sup> Burnham was forced by her husband to work as a prostitute. She expressed consent, but she did not assent. In contrast, the complainant in Bink was a fellow inmate of Bink's in a New York jail. After complaining to the police of being forced to engage in sexual acts, he refused protection, asking instead for the police to surveil the next incident. He expressed a lack of consent to Bink, but assented. Indeed, the court found that the complainant's subjective assent prevented a conviction for rape. In both these cases, then, the internal state better indicated how the victim experienced the interaction with the defendant. Burnham felt wronged; Bink's victim did not. The reason to think consent is more like abandonment than promising, then, is that we think the internal choice view respects the autonomy that grounds consent and that this view reflects when the putative victim experiences that she is or is not wronged.

## 2. The Willed Acquiescence View Is Adopted by Tort Law

It bears noting that consent is a normative power that extends beyond sexual assault, and that we ought to see our view of it as implicating not only other crimes, but also the law of torts. With respect to tort law, Tentative Draft No. 1 of the Restatement (Third) of Torts likewise proposes a subjective state for consent. It proposes:

### § 112. Actual Consent

A person actually consents to an actor's otherwise tortious conduct if the person is subjectively willing for that conduct to occur. Actual consent need not be communicated to the actor to be effective. It can be express or can be inferred from the facts.<sup>40</sup>

The Restatement (Second) of Torts currently endorses the view that this subjective, not expressed, assent is sufficient to be effective.<sup>41</sup> Consider Illustration 2 to the Restatement (Second) of Torts § 49 (notably the Restatement (Second) employs "assent" for an expression of consent):

2. Upon the recommendation of A, his doctor, B assents to an operation for the removal of a septum from his nose. Nothing whatever is said about performing a tonsillectomy. Actually B has had trouble with his

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<sup>39</sup> WESTEN, *supra* note 17, at 139–60 (discussing *People v. Burnham*, 176 Cal. App. 3d 1134, 1144–45, 222 Cal. Rptr. 630, 638–39 (Cal. Ct. App. 1986) and *New York v. Bink*, 444 N.Y.S.2d 237 (N.Y. App. Div. 1981)).

<sup>40</sup> RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 112 (AM. LAW. INST., Tentative Draft No.1, 2015).

<sup>41</sup> RESTATEMENT (SECOND) OF TORTS § 892, cmt. b. (AM. LAW INST. 1965).

tonsils and desires that A remove them too, but he forgets to mention it. A removes the septum and the tonsils while B is under a general anesthetic. Although B has not assented to the tonsillectomy, his actual willingness to submit to that operation constitutes consent to it and A is not liable to B.<sup>42</sup>

Similarly, an illustration to § 892 provides:

1. A informs his neighbor, B, that he is glad to have all of his neighbors make use of his swimming pool. C, another neighbor, without any knowledge of A's statement to B, enters the pool and enjoys himself. A brings action against C for trespass to land. On the basis of A's statement to B, it may be found that he has consented to C's entry and that C is not liable.<sup>43</sup>

Admittedly, the Reporter's Notes indicate that there are no reported cases of such instances of unmanifested consent.<sup>44</sup> Likewise, Ken Simons, in his recent survey of the law, was also unable to find actual cases.<sup>45</sup> Still, the point remains that a person is not wronged when he has chosen to allow the act. Whether viewed as "willed acquiescence," "choice," or "willingness in fact," the idea remains the same—it is the internal mental action of the consentor that determines whether it is permissible for the other person to act.

Notably, the Restatements are not presenting these cases as cases in which there is no consent but also no harm.<sup>46</sup> Rather, "subjective willingness" is itself deemed sufficient to constitute consent. Therefore, tort law's position is of consequence because (1) it provides further support for my claim that willed acquiescence is consent and (2) law reformers ought to be aware of what other areas of law are doing and be cautious in adopting different definitions of the same normative mechanism.

### 3. Why Changing the Grounding Does Not Change Why Consent Matters

To this point, I have argued that consent, as a normative power of dropping a claim of right, is an internal choice made by the consentor. To make this claim, I have employed hypotheticals that include walking across the grass and using

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<sup>42</sup> *Id.* § 49, cmt. a, illus. 2.

<sup>43</sup> *Id.* § 892, cmt. b, illus. 1.

<sup>44</sup> *Id.*, cmt. b, Rep. Notes.

<sup>45</sup> Kenneth W. Simons, *Consent and Assumption of Risk in Tort and Criminal Law*, in UNRAVELING TORT AND CRIME 330 (Matthew Dyson, ed., 2014).

<sup>46</sup> *Cf.* WERTHEIMER, *supra* note 11, at 147 (acknowledging that there is no "right to complain" despite the fact that there is no consent)

another's pool. Some readers may object that sex is different, and that it is grossly insensitive to compare stomping on someone's lawn to unwanted sexual intercourse.

To carry the argumentative burden at this point, however, a proponent of a different model of consent cannot make an argument about what sexual relationships should be like. Instead, a proponent has to make an argument that consent to sex is different in kind from other sorts of consent, such that how we understand what it *is* must be different. Any argument that we should make the rules of consent depart from what consent really is, is simply beside the point. We first need to establish what consent is; only then can we consider whether something other than that should be required legally. No one doubts that unwelcome penetration is far more wrongful and harmful than trampled grass. But the question at the moment is whether the mechanism by which sex becomes permissible is different than the mechanism that allows one's neighbor to walk on one's grass. Unless a theorist is going to urge that the background power imbalance is so coercive that meaningful consent is never possible—and certainly some scholars do make this further claim,<sup>47</sup> I maintain that our understanding of consent to sex should be in accord with our understanding of consent generally.

Although I claim that consent derives from sexual autonomy, shifting to another grounding does not necessarily change the analysis. For example, Tuerkheimer eschews autonomy in favor of “sexual agency,” an idea that includes sex's social construction and the power dynamics within and outside of relationships.<sup>48</sup> However, whether framed as autonomy or agency, one of the ideas that motivates shifting to an expressive model is this: if the consentor does not communicate consent to the consentee, then the consentee does not value and respect the consentor if he proceeds. He treats her as an object, not as a subject, who is the author of her own destiny.

There are two potential ideas entangled here: one idea deals with what we take to be the “wrong” of rape and the other deals with the distinction between wrongdoing and culpability. Let us take them in turn. If a man proceeds without knowing whether the woman consents (but let's assume that the woman is assenting), then this is disrespectful, no doubt. This idea, though, is not inextricably intertwined with sex. After all, in the illustration to § 892 of the Restatement (Second) of Torts, C is disrespectful by using A's pool without asking.<sup>49</sup> But is this disrespect the primary wrong in rape? Or is the primary wrong that the boundary is crossed without the other person's willingness? Disrespect can be manifested in myriad ways, but violating claim rights turns on

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<sup>47</sup> See, e.g., CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 175–76 (1989); ANDREA DWORKIN, INTERCOURSE 124–126, 137 (1987).

<sup>48</sup> Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335, 339 (2013), <http://www.yalelawjournal.org/forum/sex-without-consent>.

<sup>49</sup> See text accompanying note 42.

whether the consentor chooses to allow the contact. If we wish to respect agency, why should this not turn on the agent's acquiescence?

Even if we thought that disrespect was its own wrong, this idea would require its own theorizing. Indeed, the necessary theorizing would have to include those cases in which the sex was not only acquiesced to but also positively desired as in the human alarm clock example above. If the woman in that example performs the act on a dare and does not believe he is awake, much less willing, then although he experiences no wrong, she disrespects him. But is this disrespect morally on par with what we are typically criminalizing with sexual assault statutes? How far will these cases go? What if during a sexual act one of the people fantasizes about someone else? Is that the same disrespect? No matter how noble the motives of those theorists who wish to move us toward respectful sexual relations, the criminal law is doing a serious disservice when agency and respect are simply trotted out for one crime without taking seriously the breadth and depth of the claim.

Secondly, no criminal law needs to ignore disrespect completely either. Recognizing that the core of consent is a mental act still allows for the prosecution of culpable actors but it more appropriately labels cases where assent exists. In cases such as *Bink*, attempt liability is available.<sup>50</sup> On the facts as the defendant believes them to be, the victim's assent is not present. In contrast, though, it seems inaccurate to deem conduct "rape" or even "sexual assault" when it is not experienced as an autonomy violation by the victim.<sup>51</sup>

Another theorist who seeks to understand sex as distinct from other consented-to activities is Michelle Anderson. Anderson advocates a negotiation model that individuals talk prior to sex and "negotiate" in lieu of "consent."<sup>52</sup> There is much wisdom in Anderson's thinking that first-time intimates in an age of sexually transmitted diseases really should talk to each other before intercourse occurs. And, Anderson cites statistics to indicate that many do.<sup>53</sup> However, our desire to advocate for free flowing communication, mutual respect and appreciation, is still a somewhat different question than the question of whether the individual consents. And, you cannot supplant consent with negotiation any more

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<sup>50</sup> WESTEN, *supra* note 17, at 161.

<sup>51</sup> *Id.* (arguing that if a putative victim subjectively and voluntarily chooses an act of sexual intercourse, she does not suffer the primary harm of rape). For the argument that attempts should be punished the same as completed offenses, see ALEXANDER & FERZAN, *supra* note 12, ch. 5.

<sup>52</sup> Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1421 (2005) (requiring "communication that is verbal").

<sup>53</sup> A survey performed after Anderson's article indicates that approximately 50% of teens talk about contraception or STIs before first having sex. KAISER FAMILY FOUND., *SEXUAL HEALTH OF ADOLESCENTS AND YOUNG ADULTS IN THE UNITED STATES 2* (2014), <https://kaiserfamilyfoundation.files.wordpress.com/2014/08/3040-08-sexual-health-of-adolescents-and-young-adults-in-the-united-states.pdf>.

than you can convert abandonment into a promise. We are asking how one can drop a claim right, and one can drop a claim right through will alone.<sup>54</sup>

In summary, this section has argued that the best understanding of consent's core is that it is willed acquiescence—a choice to allow the conduct. Culpability factors in at this level because we can reach a defendant who proceeds without a belief he has his partner's consent (and who manifests disrespect for another's agency) by using attempt provisions. The criminal law has resources to reach the culpability of the disrespectful without contorting the contours of consent.

#### 4. Expressing Consent

Although I believe consent is merely the choice—willed acquiescence, it is worth pointing out two alternative views—consent as a performative and consent as the expression of the underlying mental state. My claims will be as follows. First, I find the notion that consent is simply a performative to be dubious. Second, to the extent individuals adopt expressive views of consent, they likely believe silence, under certain conditions, is sufficient to express consent. If they hold the latter belief, then the troubling departures I discuss in future sections, between what consent is and how reformers wish to define it, still exist.

To view consent as a performative is to take the position that by saying “[some conventionally understood as consent phrase],” one consents.<sup>55</sup> We might be a society that believes “peekaboo” counts as consent, just as we are a society that makes “I now pronounce you man and wife” count for marriage or “you're out” count for being out in baseball or “I promise” count for promising.

In light of these examples, it should be clear there is no paradigmatic way we must express consent. Rather, we simply pick words or conduct. Just as society might have chosen that green means stop and red means go, we might choose any number of things to count as consent.

Here is why I think we don't really think that consent is just a convention, where we can just stipulate to the sorts of behavior that count as a “yes.” There was and certainly remains widespread resistance to the marital rape exemption. Consider two different ways to argue against the exemption. The first would be to say that although saying “I do” could be the way that society generates a wife's consent to sex with her husband, this consent is impossible or inappropriate because of the temporally extended duration of what she is consenting to. Just as you can agree to mow someone's lawn but cannot consent to be a slave, the thought would go, you can't consent to sex with your spouse at his whim.

The second way to object would be to say that it is just false that by getting married one is agreeing to have sex with her husband at his whim. One court, for

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<sup>54</sup> The question of whether, even if consent is willed acquiescence, the law ought to require something more is addressed below.

<sup>55</sup> WERTHEIMER, *supra* note 11, at 147.

example, called the marital rape exemption “a fiction.”<sup>56</sup> Indeed, I think that most people would object to the marital rape exemption, not because of its unboundedness but because of its falsity. The problem is that the performative view of consent does not have truth conditions. Whether sincere or insincere, saying makes it so.<sup>57</sup> If consent is a performative, the argument that she did not mean it or *actually* consent is beside the point if she said the magic words. She would be engaging in the conduct that constitutes consent. Consider the view that if you say, “I promise,” you have promised even if your fingers were crossed. This performative view holds that it doesn’t matter what you subjectively experience, all that matters is the intentional use of a convention. Hence, any argument that by saying “I do,” the wife does not consent to sex because she does not by so saying indicate true subjective willingness is an argument that implicitly rejects the view that consenting is like promising. Such a position is incompatible with the view that consent is simply a performative. It is instead an argument that consent is something internal to the actor and not just some ritual in which she intentionally engages.

Now, let’s turn to views that seek to require both the underlying willed acquiescence and the expression thereof. One might think the notion that consent is “in the head” is too solipsistic. But even for those who look at manifestations, we frequently take failures to object, under situations when people otherwise would speak up, as consent.<sup>58</sup> We might think that consent is an act or omission that manifests willed acquiescence, such that failure to object is a manifestation of consent in certain circumstances.<sup>59</sup> Say (as frequently happens) my son kicks my chair at the dinner table. Usually, I immediately snap at him. But one Sunday night, I am feeling mellow and less territorial and it just does not bother me. Not only do I think “this is okay with me” but I omit to object under circumstances where ordinarily I would speak up. I think we would say that I could not yell at him the next day because under those conditions, I had consented.

Notably, the concerns I raise below apply not only when one believes consent is an internal act but also when one believes consent is an internal act that is sometimes “expressed” by an omission. Although philosophically, I believe the former answer is correct, I will not spend further time arguing between them. Even if one takes a more ecumenical approach to the possible ontology of consent, one ought to still be worried about the extent to which our criminal law might depart from consent’s true nature.

Moreover, to the extent we are worried that individuals do not have a legitimate basis for believing they have consent, the law can capture these actors as culpable. That is, irrespective of how one views consent, culpable actors, who

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<sup>56</sup> Regina v. R [1991] 3 WLR 767 (Eng.).

<sup>57</sup> J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 14–16 (2d ed. 1975).

<sup>58</sup> WERTHEIMER, *supra* note 11, at 147.

<sup>59</sup> I am indebted to Richard Bonnie for the suggestion of this formulation.



consciously disregard the risk that they do not have consent, are still blameworthy and punishable. And they are blameworthy and punishable even if they have not wronged the victim when she subjectively chooses to allow the conduct, or when she means by her silence to convey her acquiescence. More important to our purposes than the mismatch that occurs when the victim consents but the defendant remains unaware, is the victim who does not consent but the defendant who believes she does. This Part is intended to establish that these divergences are possible. The rest of this Article will focus on the more pressing concern of when the victim does not consent but the defendant believes she does.

## II. AFFIRMATIVE EXPRESSION MODELS AND DEFENDANT RELIANCE

Some codes and commentators maintain that consent is not an internal subjective state, but is instead an expression. Proposals include both “no means no” and “only yes means yes.” The “no means no” proposal does not say that consent is presumed unless there is a “no,” but rather, offers a “no” as conclusive proof of the impermissibility of sexual contact. In contrast, the “only yes means yes” model—often called a requirement of affirmative consent—requires that the consenter, by words or actions, express her willingness to allow the contact. I will employ “affirmative **consent**” solely with respect to the “only yes means yes” proposal, but refer to both as “affirmative **expression**” models.

One rationale for requiring an expression of assent is that it protects defendants. Here, the thought would be that a defendant cannot know what is in the hidden recesses of the victim’s mind. She can only know what he expresses. Accordingly, if a reasonable person would think the victim is saying “yes,” then the victim is, for all intents and purposes, saying “yes.”

This is the view of consent that tort law calls “apparent consent.” It is the idea that if the outward manifestation says “yes” then defendants ought to be able to rely on those manifestations. As the Reporters to the Restatement (Third) note:

The case law is not crystal clear, however, on the question of the scope of [the apparent consent] doctrine. The broad view simply asks whether a reasonable person in the position of the actor would believe that the victim consented. A narrower view requires that the actor’s “reasonable” beliefs be based specifically on the words and conduct of the plaintiff.<sup>60</sup>

The Reporters ultimately endorse the broad view, which holds the victim to have consented no matter what the victim does or does not do.<sup>61</sup>

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<sup>60</sup> RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 101 at 45 (AM. LAW INST., Tentative Draft No. 1, 2015).

<sup>61</sup> *Id.* (“This Restatement endorses the broader view of apparent consent.”).

Criminal lawyers should clearly see there is a better way to do this—through *mens rea*. The law may simply ask whether the defendant recklessly disregarded the risk that the victim was not consenting or whether his views were completely in line with the facts. An external expression as part of our *actus reus* is unnecessary when the very same thing can be accomplished far more elegantly by directly attending to *mens rea*. That is, the criminal law would simply say that the defendant lacked the *mens rea* necessary for the attendant circumstance of consent. Because his belief was reasonable, he did not act recklessly or negligently vis-à-vis the lack of consent. It is only because tort law lacks the nuanced element analysis of the Model Penal Code that it converts a question of culpability into one of consent.<sup>62</sup>

### III. AFFIRMATIVE EXPRESSION STANDARDS, VICTIM PROTECTION, AND DEFENDANT CULPABILITY

The current motivation for affirmative expression models is not the protection of defendants who might otherwise be misled into violating a victim's rights. Rather, the idea behind “no means no” and “yes means yes” models is to be victim-protecting. Consider two purported benefits. First, by stating the expressions that prevent or allow sexual contact, the formulations provide clear rules of conduct. Second, the hope is that rather than asking whether the “victim really wanted it,” juries need only look at objective indicia (thereby potentially bypassing difficult inquiries into the relationship between intoxication and assent; and shielding the victim from at least some more searching inquiries into how her behavior is “responsible” for his belief).

Affirmative consent standards are adopted in some states and hundreds of colleges and universities. At the time of this writing, the proposed Model Penal Code provisions are in flux. However, even if it is questionable whether the version discussed herein will ultimately be adopted, the provisions suggested and the reasons for them are illustrative of affirmative expression models and the drafters' rationales. Hence, rather than attempt to hit a moving target, this Article offers an exploration of the sorts of statutes that rape law reformers advocate. The following definition from the proposed Model Penal Code provision highlights these expression models:

(3) “Consent” means a person's positive agreement, communicated by either words or actions, to engage in a specific act of sexual penetration or sexual contact.<sup>63</sup>

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<sup>62</sup> *Id.* (noting that tort law lacks the refined element analysis present in the Model Penal Code).

<sup>63</sup> See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 29 (AM. LAW. INST., Discussion Draft No. 2, 2015).

The Reporters provide the following justification for their definition:

In light of the difficulty in establishing subjective intentions, coupled with the importance of encouraging both the frank communication of sexual desires along with respect for that information when communicated by others, consent is defined as an action, not a state of mind. As defined, it does not require express verbal assent. But it does require some indication of positive agreement, expressed either through words or action.<sup>64</sup>

In this Part, I begin by articulating the motivation for a shift from willed acquiescence to affirmative expression models. Then I note how affirmative consent standards create substantively strict liability, or at the very least, negligence per se rules. I further address issues with the fact that because the criminal law is changing, not adopting, the underlying social norms, citizens may lack notice of the law. Finally, I raise the concern that affirmative consent models may be doing more than adopting consent standards; they may ultimately be requiring requests.

#### A. Motivating “No Means No”

Let us begin with “no means no” models. Why opt for a model that defines consent negatively in terms of proceeding in the face of refusal? Consider the relationship between “no means no” and force in *Commonwealth v. Berkowitz*.<sup>65</sup> There, the defendant proceeded with sexual intercourse despite repeated verbal “no’s” from the victim. He did not use force or threaten her. The Pennsylvania Supreme Court found that the defendant did not rape the victim: “As to the complainant’s desire to leave the room, the record clearly demonstrates that the door could be unlocked easily from the inside, that she was aware of this fact, but that she never attempted to go to the door or unlock it.”<sup>66</sup> Now, perhaps reversing the defendant’s rape conviction was correct given that the statute required force, but that is precisely what has led to the push for different models. If Berkowitz’s victim finds that her “no’s” are being ignored and the victim suffers frozen fright, then why is that not good enough for rape? (Notably, the Pennsylvania Supreme Court did find that the jury’s verdict supported the lesser offense of indecent assault. The jury found the “no’s” did constitute lack of consent, and the crime that required only lack of consent was upheld. The outcry after this case was

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<sup>64</sup> *Id.* at 30.

<sup>65</sup> 537 Pa. 143, 641 A.2d 1161 (1994).

<sup>66</sup> *Id.* at 148.

premised on commentators' beliefs that Berkowitz's actions ought to count as "rape.")<sup>67</sup>

The idea, then, behind a "no means no" model is the Berkowitzes of the world do not get to be morally obtuse.<sup>68</sup> The law can prescind away from questions of whether the woman did or did not want intercourse and simply ask the question whether her behavior authorized intercourse. There can be a gap between that to which the victim does or does not acquiesce and her outward behavior. But the defendant is not entitled to claim that he thought the "no" meant "yes." The only question on the table is whether she said, "no."

It is important to see why and how criminal law reformers have shifted to these affirmative expression models of consent. Assume that a statute takes willed acquiescence under conditions of sufficient freedom and information to constitute consent. Berkowitz is proceeding with his conduct despite his victim's "no's." The traditional criminal law question would begin by asking, not just whether the victim consented (the *actus reus* question), but what Berkowitz's *mens rea* was with respect to lack of consent. If a jurisdiction required recklessness as to lack of consent—and recklessness is the default *mens rea* in the Model Penal Code—then Berkowitz's honest belief that the "no" meant "yes" would be sufficient to absolve him of criminal responsibility because he was not aware of the substantial risk that she did not consent. Reformers then could consider a lower *mens rea*, arguing that negligence is the appropriate *mens rea* with respect to consent. This would mean that Berkowitz's mistake would need to be honest and reasonable. Even then, however, the problem remains as there exists the argument that in some instances even a reasonable man could believe that a "no" meant "yes."

That, of course, is part of the dilemma. How can our sexual mores deem it to be reasonable for a man to proceed in the face of a "no"? Relying on male interpretations of female conduct to ascertain willingness is often a problem. Men are far more likely to perceive sexual interest that does not exist.<sup>69</sup>

What comes next is a desire to create a bright-line rule. It may be that some notion of willed acquiescence is what we think consent "really is" but that we wish to create a prophylactic rule and empower women. The idea then is that men do

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<sup>67</sup> I am a good deal less sympathetic to labeling arguments. Determining the label is not nearly as important as setting the culpability, harm, and punishment correctly. See ALEXANDER & FERZAN, *supra* note 12, at 265–66 (criticizing the debate over whether something is "rape" and arguing that unpacking crimes into risks to legally protected interests is more perspicuous).

<sup>68</sup> See SUSAN ESTRICH, *REAL RAPE* 97 (1987) ("More common is the case of the man who could have done better but did not; could have paid attention, but did not; heard her refusal or saw her tears, but decided to ignore them.")

<sup>69</sup> See Coreen Farris et al., *Sexual Coercion and the Misperception of Sexual Intent*, 28 *CLINICAL PSYCHOL. REV.* 48 (2008) (reviewing the literature); Martie G. Haselton & David M. Buss, *Error Management Theory: A New Perspective on Biases in Cross-Sex Mind Reading*, 78 *J. PERSONALITY & SOC. PSYCHOL.* 81 (2000) (arguing that there are systematic errors made by men in evaluating women's sexual interest and positing that these differences were evolutionarily adaptive).

not get to be “reasonably” insensitive and continue in the face of a clear “no.” Reading just a handful of rape cases leads one to ask how a man could conceivably think it permissible to continue in the face of repeated statements that the intercourse is unwelcome. Sexual assault is a horrendous crime. The profound impact of this extraordinary assault to autonomy and bodily integrity exists irrespective of the defendant’s intentions.

The way to avoid mistaken interpretations is to set clear rules. As long as the defendant understands that what is being said is “no,” it does not matter whether he believes that the victim is actually consenting. The same is certainly true of an affirmative consent standard whereby only “yes” via words or conduct can constitute a green light. The idea is basically, that the defendant is sitting at a red light until he gets the green.

### *B. The Consequence: Substantively Strict Liability Laws*

In choosing to adopt a rule for consent, and one that departs from what consent really is, the code risks imposing strict liability. The shift to “no means no” changes the meaning of “no” from a factual meaning (evidencing acquiescence) to a legal meaning (deeming sex impermissible). When the criminal law says that “no means no,” it is not making an empirical claim. Perhaps the consentor is saying “no” when she means “try again in ten minutes.” But the law is stating that by saying “no,” the consentor has made it legally impermissible to continue. The utterance is a verbal act that makes it impermissible to continue, irrespective of the utterer’s beliefs or desires. Stop lights are stop lights. They don’t signal whether opposing traffic is actually present. “No means no” is a claim that the expression of a “no” renders the act impermissible.<sup>70</sup> We should pause to fully understand the effect of shifting the meaning of “no” from a question of fact to one of law.

By giving “no” a legal meaning that can depart from its factual meaning, a code adopts strict liability. This is because the code as stated disallows proof that the defendant honestly, or honestly and reasonably, believed that assent was present. In other words, if the defendant cannot introduce evidence that he honestly and reasonably believed the woman assented, despite saying “no,” then the proposed statute is strict liability as to assent. (The defendant can only introduce evidence as to whether he honestly (and/or reasonably) believed she communicated “yes” or “no”). Taking this evidence off the table is indeed the very point of shifting the definition of consent.

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<sup>70</sup> WESTEN, *supra* note 17, at 82–83 (clarifying that “no means no” gives “no” legal significance).

In stating that a code is adopting strict liability, I am relying on the notion that affirmative expression statutes would be substantively, not formally, strict.<sup>71</sup> As Ken Simons explains:

a substantive conception of strict liability and fault examines the offense elements themselves, considers the interrelationship between offense elements, culpability terms, and the relevant ultimate harm, and requires a substantive criterion of fault that might not correspond simply and directly to formal culpability requirements. Knowing possession of firearms, or of burglar's tools, or of matches, or knowing possession of matches as a result of which a fire is caused, or knowing operation of a gas-powered vehicle near a forest, are instances of formal fault, but not necessarily substantive fault, since the legislature might only be interested in these forms of "knowing" (and, in the formal sense, culpable) conduct insofar as they create a risk of other harms.<sup>72</sup>

The concern with substantively strict statutes is not that they lack mens rea terms. The concern is that they may punish nonculpable actors.<sup>73</sup> Advocates of affirmative expression models seem to conflate substantive and formal strict liability in their defense of affirmative expression requirements. For instance, in response to the concern that individuals may "lack personal culpability," the Reporters for the Model Penal Code project assert "once the penal code endorses this norm as an important social-protection safeguard, culpability is inherent in any knowing or reckless violation of it, just as culpability is inherent in the conscious disregard of any other criminal-law standard that seeks to minimize risky behavior."<sup>74</sup> Similarly, Anderson defends her negotiation model—a model that requires a verbal "yes"—with the assertion that "rape law under the Negotiation Model continues to require customary mens rea."<sup>75</sup> But formal mens rea standards cannot rescue substantively strict provisions. I can purposefully possess a piece of cheesecake, but pointing out that I possess it purposefully does not show any personal culpability on my part. The law needs a reason for prohibiting the purposeful possession. So, aiming to shift a social norm and possibly punishing

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<sup>71</sup> See Kenneth W. Simons, *Criminal Law: When Is Strict Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1087 (1997).

<sup>72</sup> *Id.* at 1087–88.

<sup>73</sup> The use of "culpability" in the sentence above is referring to moral culpability or broad culpability, not to whether a particular mental state element is satisfied. See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.02[B] (6th ed. 2012); Douglas Husak, "Broad" Culpability and the Retributivist's Dream, 9 OHIO ST. J. CRIM. L. 449 (2012).

<sup>74</sup> See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 47 (AM. LAW. INST., Discussion Draft No. 2, 2015).

<sup>75</sup> Michelle J. Anderson, *Reply*, in CRIMINAL LAW CONVERSATIONS 314, 315 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009).

individuals who are not morally culpable is a problem that cannot be magically solved by inserting “knowingly or recklessly” in the statute.

The question then is how concerned we ought to be with a law that seeks to create a “new” rule for consent. I think we ought to be troubled by this, but let me first situate affirmative expression models within the broader context of legal rules and the ways that legal rules might punish the morally innocent.

First, when criminal codes adopt rules instead of standards, these codes will be under and over-inclusive.<sup>76</sup> Assume that we only want people to have sexual relations when both parties have the capacity to appreciate that to which they are consenting. We could opt for this standard (for example, “no sex unless person has the capacity to appreciate the nature and quality of the act”). But assume that a twenty-four-year-old man is very attracted to a fifteen-year-old girl, who is conversely attracted to him. She may not really understand what she is getting herself into, and so she can’t judge her capacity. And, the only person who is perhaps less able to judge her capacity is the man who very much wants to have sex with her. Recognizing that individuals in this situation may very well get this question wrong, the law adopts a rule: “No sex with people under 16.” This rule will be under-inclusive because some sixteen-year-olds may not be able to meaningfully understand what they are doing. The rule will also be over-inclusive because some fifteen-year-olds may be able to meaningfully consent. But the law sets a rule. Where the rule matches its background justification, it is a good rule. And, if the rule is too over-inclusive, we can rightly complain about whether the rule is justly punishing.<sup>77</sup>

Second, criminal codes adopt “presumed offenses.”<sup>78</sup> These are cases where the act that is criminalized is good evidence of the conduct that is itself wrongful. So, possession of certain amounts of drugs is punished equivalently to possession with intent to distribute at the point at which no one would have that volume of drugs for personal use. Now, just as gun owners fearing restrictions from then-President-elect Obama “loaded up” on weaponry, perhaps some marijuana users will increase their personal stashes if a Republican gets elected. Then, the presumed offense would capture people who do not intend to distribute. A presumed offense is arguably only justified if a jury considering the evidence of a

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<sup>76</sup> FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 31–37 (1991) (noting ways in which rules may be ill-fitting to their background justification).

<sup>77</sup> DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 154–55 (2008) (arguing that criminal legislation should be no more extensive than necessary and that there ought to be a presumption against overinclusion); see also Sherry F. Colb, *Freedom from Incarceration: Why is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 821 (1994) (advocating for a higher degree of scrutiny for criminal statutes because “liberty from confinement cannot be relegated to the status of unprotected aspects of daily life, subject to any regulation that is not utterly irrational”).

<sup>78</sup> See generally Frederick Schauer, *Bentham on Presumed Offences*, 23 UTILITAS 363 (2011).

would be able to conclude beyond a reasonable doubt that *b*. Of course, presumed offenses make an irrebuttable presumption, so defendants do not even have the opportunity to complain about over-inclusiveness.<sup>79</sup>

That said, given that myriad statutes exist that prevent a defendant from arguing that an underlying fact or justification does or does not exist, it is fair to ask why we should be so concerned if affirmative expression standards deviate from what consent “really is.” If Bob can’t argue that Sally can consent at fifteen, and Julie can’t argue that her stash of marijuana was solely for her own use, then why should Greg be able to argue that Joanie “really consented” when she also said “no”?

The difference between Bob and Julie on the one hand and Greg on the other hand is the mismatch. What is morally wrong, and what the practice is on the ground, both substantially depart from the norm the law is adopting in instances where codes adopt affirmative expression definitions of consent. In asking whether a “no means no” or “only yes means yes” standard is appropriate, one initial question is whether there can be a departure between the internal state of the speaker and the external manifestation. No matter how distasteful some may find the contention that “no” may mean “yes,” it is still a question that any legislator must ask when deciding whether to adopt an affirmative expression model. We must know whether the departure between internal acquiescence and external manifestation is possible so that we know whether a code can be substantively strict and how potentially widespread the strict liability is.

The problem is, of course, that a man may make a mistake as to whether such an internal state is present. He may believe that she “means yes” when she “says no.” And the reason why he may make this mistake is that it is possible for a woman to say “no” when she means “maybe” or “yes.”<sup>80</sup> The 1988 Muehlenhard and Hollabaugh survey of college women indicated that 39% had said “no” when they intended to engage in intercourse.<sup>81</sup> A later study found that men engaged in

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<sup>79</sup> Cf. Larry Alexander, *The Supreme Court, Doctor Jekyll, and the Due Process of Proof*, 1996 SUP. CT. REV. 191, 198–99 (1996) (noting that permissive inferences combined with the failure of the defendant to produce any proof to the contrary may be in accord with a beyond a reasonable doubt standard but when defendants are barred from producing evidence to undermine the permissive inference (as in the case of voluntary intoxication in Egelhoff), a permissive irrebuttable inference is created).

<sup>80</sup> Even rape reformers admit this possibility. See STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 59 (1998) (noting “beneath the surface, in the messy, emotionally ambiguous real world of dating, petting, and sexual exploration, ‘no’ doesn’t always mean no”).

<sup>81</sup> Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women’s Token Resistance to Sex*, 54 J. PERSONALITY AND SOC. PSYCHOL. 872, 872 (1988). A later study in 1994 found a similar phenomenon in Russia and Japan. Susan Sprecher et al., *Token Resistance to Sexual Intercourse and Consent to Unwanted Sexual Intercourse: College Students’ Dating Experiences in Three Countries*, 31 J. SEX RES. 125 (1994). Admittedly, at this point, both studies are outdated. Kahan’s, however, is more recent.



token resistance more frequently than women.<sup>82</sup> Even Dan Kahan's recent study wherein subjects were introduced to a stylized version of the Berkowitz case found that "40% of the subjects, across conditions, indicated they agreed that '[d]espite what she said or might have felt after, Lucy really did consent to sexual intercourse with Dave.'"<sup>83</sup> Hence, we understand that there are contexts in which people say things they do not mean. A woman who takes her partner's "no" to mean "yes" may be accurately assessing her partner's willingness to engage in intercourse or other sexual contact. Similarly, silence may be misinterpreted. A man may believe that his partner's silence is acceptance or coyness when it is, in fact, "frozen fright." As Stephen Schulhofer notes:

If we consider actual behavior of real people in our world as it stands, mistakes about consent, including mistakes about the meaning of "no," are undoubtedly frequent. And sometimes, in some settings, those mistakes will be "reasonable," even from the perspective of many women.<sup>84</sup>

Importantly, the idea behind affirmative expression models is not to make an empirical claim. It is not a claim about whether when women say "no" they mean it. It is instead, the claim that a "no," like a red light, requires stopping. Or that a "yes," like a green light, delineates when it is permissible to proceed. So, the idea is not to make sure that people say what they mean, but instead to hold both parties to what is said. If the umpire has the final say, then when he says "you're out," then you're out even when he gets the underlying facts wrong.

Codes that adopt affirmative expression models may be admirably attempting to protect women. However, we do not currently consent under the presumption that "only yes means yes." Accordingly, a man might believe, or even reasonably believe, that a woman is assenting despite her expression of nonconsent. So, too, a woman might misinterpret her partner's inexpressiveness and believe that her partner assents. If these potential defendants are punished in order to cause social change or to protect women by creating prophylactic rules, then we are punishing individuals who are nonculpable as to what we really care about (nonconsensual sex) in order to accomplish our goal (better and more accurate communication about consent). We are punishing the morally innocent. We should pause before punishing the innocent for the collective good.<sup>85</sup> As Robin Charlow argues against

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<sup>82</sup> Sprecher et al., *supra* note 81, at 130.

<sup>83</sup> Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 784 (2010).

<sup>84</sup> SCHULHOFER, *supra* note 80, at 65.

<sup>85</sup> *Accord* Husak & Thomas, *supra* note 37, at 107 ("In fact, a great deal is lost in the interval between when the new law is passed and behavior comes to correspond to it. In this time period—which could be several years or even decades—men who make mistakes about consent to sex that our theory assesses as reasonable will be convicted and punished. And these punishments no doubt will

Anderson's negotiation model, "Are we going to imprison a generation of young men, for felony rape, until enough of them get the message?"<sup>86</sup>

The criminal law must take seriously that to brand someone a criminal is to stigmatize him and to subject him to hard treatment, often incarceration. This sort of condemnation is appropriate only when there is a guilty mind. Death is an extraordinary harm, but criminal liability does not fall upon those who cause it accidentally. Moreover, in the sexual assault context, labeling someone as a sex offender potentially subjects that person to a wide array of collateral consequences.

The burden on potential defendants is not minor. It may first appear that the parties must simply expend further effort to get clarification.<sup>87</sup> If on a particular occasion "no" actually means "yes," the parties will need to clarify their desires. A man will simply need to wait to discern whether unresponsiveness is merely coyness or frozen fright. This way of framing the tradeoffs might be analogized to being stuck at a red light at high noon, with visibility for miles, and not another car in sight. The driver may recognize that there is no reason that he should wait, and yet, we require him to absorb the minor inconvenience of waiting for the light to change. The benefit of clear rules of "green means go" and "red means stop" is thought to outweigh the few seconds of minor inconvenience. With respect to their affirmative consent standard, the Reporters for the Model Penal Code revision seek to characterize the downside as just "arguably awkward efforts to clarify the situation or (temporarily) missing an opportunity for a mutually desired encounter[.]"<sup>88</sup>

However, that way of thinking presupposes something very important and that is that we all know that "green means go" and "red means stop." In contrast, the entire point of these provisions is to create a new shared meaning. The man does not see the inconvenience as simply one of waiting to see if the red light turns to green. He may believe that a gray light means "try again." Hence, the traffic light analogies that are so easy to understand (and thus even I use them above) are misleading because traffic lights rely on already established meanings.

Therefore, unlike tight empirical relations for presumed offenses or the rulifying of a standard, affirmative expression models seek to change the rules of

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be severe, since rape is a serious crime. This strikes us as manifestly unjust."). Some commentators appear completely unaware of the substantial cost involved in shifting social norms. See, e.g., Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 181 (2011) ("Criminal law can and should play a more active role in changing social norms concerning sexual misconduct. Criminal law should go beyond merely reflecting social changes that have already occurred.").

<sup>86</sup> Robin Charlow, *Negotiating Sex: Would It Work?*, in CRIMINAL LAW CONVERSATIONS 310, 311 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan, eds. 2009).

<sup>87</sup> See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 47 (AM. LAW. INST., Discussion Draft No. 2, 2015) (characterizing the trade off as "an unwanted sexual intrusion" as compared to postponement "pending clarification").

<sup>88</sup> *Id.* at 68.

the game—rules that constitute a significant departure from the facts on the ground. Red and green lights don't mean stop and go in the world of sex. This law reform is not making something clearer or taking an evidentiary shortcut. Affirmative expression rules seek to change current practice.

Adding insult to injury is that ignorance of the law is not an excuse.<sup>89</sup> In other areas where a defendant may not remotely be on notice his behavior is criminally prohibited, statutes are interpreted to require a specific intent to violate the law.<sup>90</sup> We need to recognize that we are requiring not only that defendants rely on their own moral intuitions of what is right but also that defendants know the standards that the law provides. Indeed, faced with a similar criticism of her negotiation framework,<sup>91</sup> Anderson notes that she advocates for extensive education about how and why to negotiate sex.<sup>92</sup> This is a key concession because it means that a jurisdiction cannot simply adopt a code that maintains “only yes means yes” and then be said to justly punish those who violate it. This is one reason why colleges may be able to adopt affirmative consent standards more easily than the criminal law as it would take far less effort to notify students that they are required to receive an affirmative “yes” before proceeding.

In summary, in contrast to the views of consent that give what the victim chooses primacy, the requirement of particular actions shifts the meaning of “no” from a question of fact to a meaning stipulated by law. In so doing, codes adopt provisions that are substantively strict. We should be wary of punishing individuals who do not commit morally culpable acts. Additionally, in the effort to change sexual dynamics, jurisdictions must at least consider the adoption of an ignorance of law defense or engage in substantial educational efforts to inform the citizenry of the new requirements. When we say that to change the standard we will deem conduct that is nonculpable “rape,” that is problematic enough. When we do not inform citizens that this new standard is what governs their sexual conduct, the state's behavior is nothing short of criminal.

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<sup>89</sup> For a probing analysis of the tension between relying on social norms and notice thereof, see Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547 (2015).

<sup>90</sup> See *Staples v. United States*, 511 U.S. 600, 614–16 (1994) (holding knowledge that gun was automatic weapon was required so as not to criminalize widespread innocent behavior); *Cheek v. United States*, 498 U.S. 192, 205 (1991) (holding that because tax law is complex, Congress' use of the term “willfulness” in tax fraud requires a specific intent to violate a known legal duty); *Liparota v. United States*, 471 U.S. 419, 426 (1985) (holding Congress did not intend to criminalize a broad range of apparently innocent conduct and therefore “knowingly” required specific intent to violate the food stamp law).

<sup>91</sup> Kimberly Kessler Ferzan, *Sex as Contract*, in *CRIMINAL LAW CONVERSATIONS* 308 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009).

<sup>92</sup> Anderson, *supra* note 75, at 317; see also Anderson, *supra* note 52, at 1433 (advocating “widespread public education on television, in schools, and in the media about the ethical and legal importance of negotiating sexual penetration”).

### C. The Possibility of Conceptualizing “No Means No” as a Negligence Per Se Rule

There is, however, an argument that “no means no” is not actually strict liability. It may plausibly be maintained that no reasonable man could believe there is assent in the face of an expressed “no.” Part of this is an empirical question as to whether women continue to express token resistance in 2016 as they did in 1988. Part of this is a question of whether norms have shifted to an extent where our collective understanding is still that “no” legally and subjectively can still mean “yes.” Of course, to the extent that it is possible for a man to reasonably believe a “no” is a “yes,” then the law would allow the conviction of a nonnegligent actor. As Joshua Dressler notes, “[s]uch cases will be relatively few in number, but it is improper to convict a person on the basis of the law of averages.”<sup>93</sup>

Theorists sometimes seem to elide the distinction between strict liability and negligence. In advocating for the “no means no” model, Estrich states, “Reasonable men should be held to know that no means no; and unreasonable mistakes, no matter how honestly claimed, should not exculpate.”<sup>94</sup> If Estrich is saying that reasonable men *do* know that “no means no,” then she is arguing that a “no means no” consent rule is one of negligence per se. If she is saying that reasonable men do not currently think “no means no” but they should, then she is potentially advocating for a strict liability standard.<sup>95</sup> She is seeking to change the behavior of even reasonable people.

But let us assume that norms have shifted, and that “no means no” is functioning as a negligence per se rule.<sup>96</sup> It means that a reasonable person will not believe that “no means yes.” There will still be cases where this rule is over-inclusive. However, we might think that the cases in which a man honestly and reasonably believes “no means yes” are dwindling.

Consider the infamous case of *Regina v. Morgan*.<sup>97</sup> Morgan was a member of the Royal Air Force. While drinking with three more junior members of the Royal Air Force, he convinced them that they should all go to Morgan’s home and have

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<sup>93</sup> Dressler, *supra* note 36, at 433.

<sup>94</sup> ESTRICH, *supra* note 68, at 103.

<sup>95</sup> This question is further complicated by whether the “reasonable person” is the average actual person, or whether there is some objective more idealized standard for the reasonable person construct. See generally MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* (2003).

<sup>96</sup> Cf. GUYORA BINDER, *FELONY MURDER* 30 (2012) (noting that even if felony murder appears to be formally strict, it may be operating as a negligence per se rule so long as the commission of an inherently dangerous felony poses a sufficient risk that one is at least negligent vis-à-vis death).

<sup>97</sup> [1975] 2 All E.R. 347 HL (Eng.).

sex with his wife.<sup>98</sup> Morgan further claimed that they should expect his wife to resist because she was “kinky.”<sup>99</sup> Morgan’s wife testified that she was held down by two men while each of the others raped her.<sup>100</sup> The trial judge instructed that the defendants needed to honestly and reasonably believe that Mrs. Morgan consented, essentially requiring only negligence as to the element of consent.<sup>101</sup> However, the House of Lords found that rape requires recklessness as to consent and thus an honest belief (however unreasonable) that consent existed would be sufficient to negate the requisite *mens rea*.<sup>102</sup> However, the House of Lords also dismissed the appeal under Section 2(1) of the Criminal Appeal Act of 1968, essentially holding that the jury would have convicted in any event.<sup>103</sup> This latter ruling required implicit reasoning that if the jury found that the defendants did not honestly and reasonably believe Mrs. Morgan consented then it is easy to infer that the defendants did not even honestly hold the belief that Mrs. Morgan consented.<sup>104</sup>

In Morgan, we are tempted to say that no reasonable man would take Mrs. Morgan’s behavior as evidence of consent. Of course, this still means that “no means no” is acting as a negligence *per se* rule. It is saying that it is unreasonable to believe that a woman “means yes” though she expresses “no.” It bears noting that adopting such a rule goes against the generally subjectivist position of the criminal law.<sup>105</sup> The criminal law generally seeks to punish only those who are, at the very least, consciously disregarding the risk of the harm. Moreover, liability for negligence is problematic because it has the potential to punish individuals despite the lack of a capacity to meet the objective standard<sup>106</sup> and because it is questionable whether failure to exercise one’s capacities is always, or ever, culpable.<sup>107</sup> Although some scholars have argued for negligence standards because

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 349.

<sup>102</sup> *Id.* at 347.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> MODEL PENAL CODE § 2.02(3) (setting recklessness as the default culpability); *Elonis v. United States*, 135 S. Ct. 2001 (2015) (interpreting a statute to require at least recklessness as the common law presumption of *mens rea* requires a subjectively culpable mind).

<sup>106</sup> For instance, the MPC does not individualize the reasonable person test to take into account the defendant’s IQ. This means that a defendant who lacks the ability to understand the risk will be punished.

<sup>107</sup> Many theorists call into question liability for negligence. Some maintain that because failures of memory, inattentiveness, and the like are not culpable, liability is not appropriate. ALEXANDER & FERZAN, *supra* note 12, ch. 3; Michael S. Moore & Heidi M. Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 CRIM. L. & PHIL. 147 (2011). Others seek to limit negligence to a form of culpable indifference. See Kenneth W.

men are more likely to be negligent with respect to sexual consent than with respect to other factual judgments,<sup>108</sup> the concerns on the other side of the balance must also be taken into account. The branding and collateral consequences that may result from any sexual assault conviction are severe, and indeed, far more severe than many other criminal offenses. Since it is possible to be labeled a sex offender in perpetuity for having urinated in public,<sup>109</sup> any legislator must take into account the extensive collateral consequences that may attach to being deemed to have had sex with someone without her consent.

Indeed, a negligence per se rule will exacerbate some problems with punishing for negligence. Recall that one rationale for such a per se rule is that it prevents the subjectivization and contextualization of the reasonable person standard in ways that undermine equality. The criminal law thereby avoids the “reasonable drunk frat boy” assessment of reasonableness.<sup>110</sup> (Criminal law has not gone that far, but you see the point.) However, because the law does not ask the negligence question, it will not accommodate individuation of the reasonable person standard that individuals might wholeheartedly agree is appropriate. Indeed, when tort law fails to subjectivize the reasonable person standard, it creates pockets of strict liability, as it holds individuals liable who lacked the capacity to meet the required standard. That is, if in *Vaughn v. Menlove*,<sup>111</sup> the defendant who sought the “stupid farmer test” (as I was taught in Torts) was, if believed, being as smart as he could be. If he is blamed for failing to meet an objective standard he lacks the capacity to meet, then he is being held strictly liable.<sup>112</sup> If one of

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Simons, *Does Punishment for ‘Culpable Indifference’ Simply Punish for ‘Bad Character’? Examining the Requisite Connection Between Mens Rea and Actus Reus*, 6 *BUFF. CRIM. L. REV.* 219 (2002); VICTOR TADROS, *CRIMINAL RESPONSIBILITY* ch. 9 (2005); Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 *CRIM. L. & PHIL.* 137 (2008).

<sup>108</sup> Andrew E. Taslitz, *Self-Deception and Rape Law Reform*, in *CRIMINAL LAW CONVERSATIONS* 305, 305 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009) (“What justifies simple negligence liability for a very serious crime? One answer, I argue, is this: the male capacity for self-deception in sexual matters and the special moral evil it entails.”).

<sup>109</sup> Chanakya Sethi, *The Ridiculous Laws That Put People on the Sex Offender List*, *SLATE* (Aug. 12 2014 11:41AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/08/mapped\\_sex\\_offender\\_registry\\_laws\\_on\\_statutory\\_rape\\_public\\_urination\\_and.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/mapped_sex_offender_registry_laws_on_statutory_rape_public_urination_and.html) (mapping at least twelve states that require sex offender registry for public urination).

<sup>110</sup> Paul H. Robinson, *The Modern General Part: Three Illusions*, in *CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART* 77, 91 (Stephen Shute & A.P. Simester eds., 2002) (arguing “criminal law theory has yet to find a principle that will convincingly distinguish the characteristics that ought to be included from those that ought to be excluded when individualizing the reasonable person standard”).

<sup>111</sup> (1837) 132 Eng. Rep. 490, 492.

<sup>112</sup> Larry Alexander & Kimberly Kessler Ferzan, *Confused Culpability, Contrived Causation, and the Collapse of Tort Theory*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 406, 408–409 (John Oberdiek ed., 2014) (“When being the best that you can be is simply not good enough for tort law, there’s a name for that—strict liability.”).

Morgan's underlings had a very low IQ, should we be equally willing to condemn his conduct?<sup>113</sup>

In summary, even if "no means no" is not a rule of strict liability, it still runs against criminal law principles to the extent that it reaches punishment of the negligent. The criminal law has been reluctant to brand individuals as criminals when they have merely failed to act reasonably. Negligence per se rules, which evade individuation, also threaten to reintroduce strict liability standards.

#### D. *Blurring Consent and Requests*

A final concern is how the "only yes means yes" model conflates consent with a request. That is, affirmative consent standards may actually change the subject. They may not be about consent at all.

Return again to my neighbor who walks across my lawn. No one wants her neighbor to walk across the lawn. It trashes the grass. But sometimes being neighborly is allowing one's neighbor to walk on one's grass.

Requests are more than consent. Requests give another person a positive reason to do an action while simultaneously dropping a claim right via consent. A dinner party invitation both changes a trespass into a permissible entering of the home, while providing a positive reason, "Please come dine with me!"

How does this work in the context of sex? Well, unbridled enthusiasm—"Give it to me, baby"—is a request. Consent requires far less. It might be "yes," "okay," or perhaps even "whatever." Uncharitably construed, consent makes for permissible, bad sex—whereas requests make for ideal, good sex.

Now, although commentators sometimes acknowledge that they aren't seeking ideal sex,<sup>114</sup> the dialogues they imagine run roughshod over the consent/request distinction. For instance, for her negotiation model, Anderson claims that individuals might ask what the other wants.<sup>115</sup> But wanting, desiring, and welcoming, are not consenting. They require more. Even more apparent is Anderson's adoption of a request requirement when she states, "Penetration requires an assessment of active desire."<sup>116</sup>

It is hard to see this section as anything but (at best) a defense of bad sex. But our understanding of what consent is ought not to be contorted because we aim for individuals to have healthy, loving respectful relationships. I also think we should be careful in condemning all cases of mere consent as bad.

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<sup>113</sup> The Model Penal Code is generally reluctant to individualize the reasonable person test to include intelligence. See MODEL PENAL CODE & COMMENTARIES § 2.02.

<sup>114</sup> See Anderson, *supra* note 52, at 1423 ("The law cannot and should not criminalize all less than ideal penetration. Humans will at times choose to engage in sex for distasteful and sometimes odious reasons.").

<sup>115</sup> *Id.* at 1424.

<sup>116</sup> Anderson, *supra* note 75, at 315.

Imagine that Kelly is going for her black belt in karate. She asks her husband, Steve, a blue belt, to spar with her so that she can practice. He does not feel like it. He has a rough day at work; he has a bit of a headache; and he knows that Kelly is going to physically injure him (at least a bit). Steve does not welcome, want, or desire to spar with Kelly, but he loves her and so he will go along. I do not think that anyone would think that Steve should not be able to make it permissible for Kelly to spar with him simply because he is not enthusiastic about it.

Or imagine that after consenting to spar with Kelly, Steve becomes very aroused. Kelly is not up to intercourse. Perhaps she will decide to satisfy Steve's desires manually. She may clearly see this as something that she does not want, but she is willing to do. (Indeed, teenagers who aim to preserve their technical virginity may opt for activities short of sex. These may be concessions by both parties in different ways. It is hard to see such bargaining as conduct to be discouraged.) Both Kelly and Steve consent to the others' desired contact though they do not desire it. Neither set of contacts seems wrong, much less and an appropriate concern of the criminal law.

In any individual case, consent may mark ideal or nonideal conditions. Ultimately, however, the criminal law ought not to step in to regulate and require requests over and above consent. Affirmative consent models threaten to do just that.

#### IV. DRAFTING A CODE

To this point, I have focused on the problematic disparities between what consent is (willed acquiescence) and more prophylactic affirmative expression models. In this Part, I aim to address complexities that arise when such provisions become part of a criminal code. I begin by arguing that standing alone, "no means no" will be problematically under-inclusive in capturing culpable actors. I then note that "only yes means yes" provisions will be problematic because they rely on conduct that is sufficiently ambiguous that the new meaning a code seeks to establish cannot be created. If only "yes" means "yes," then criminal codes might need to require explicit expressions. I then raise problems with grading affirmative consent provisions. As noted in the previous Part, these provisions may capture negligence or strict liability. When these provisions are situated within a criminal code, it raises problems of over and under punishment, as well as the grouping of individuals with significantly disparate levels of blameworthiness. Finally, I suggest that one way of blunting some of the worries with strict liability or negligence per se provisions would be through an affirmative defense.

##### *A. The Under-Inclusiveness of "No Means No"*

To this point I have argued that from a potential defendant's perspective there are tremendous downsides to a "no means no" model. In asking whether they are worth it, we might look to whether a "no means no" model is truly sufficient to do



what we want it to do—protect the victim. The problem with a “no means no” model is that a statutory scheme that prohibited sex by force, threat, or in the face of a “no” would still be woefully under-inclusive in capturing some culpable actors. Imagine that a man gropes a woman on a subway. He does not use force, threat, or get a “no,” but his conduct is most certainly a crime. The reason it is a crime is that he does not harbor any belief whatsoever that she is willing to have the contact occur. Under those circumstances, the default between strangers is most certainly that sexual contacts are unwelcome.

Indeed, the assumption that the default in all circumstances should be a “no” is clearly part of the court’s rationale in New Jersey’s landmark *M.T.S.* case.<sup>117</sup> There, the court held that the legislature had not adopted the Model Penal Code’s definitions of rape, but had instead sought to bring rape in line with assault and battery law.<sup>118</sup> “Thus, just as any unauthorized touching is a crime under traditional laws of assault and battery, so is any unauthorized sexual contact a crime under the reformed law of criminal sexual contact, and so is any unauthorized sexual penetration a crime under the reformed law of sexual assault.”<sup>119</sup>

Notice then that although a “no means no” standard may protect against unreasonable men, it does not protect against flagrant nonconsensual contacts. Instead, an unwillingness standard, where one simply asks whether the defendant honestly believed the woman willingly acquiesced to the contact, would better protect the rights of victims.

Notably, one version of the proposed Model Penal Code provisions leaves such a gap. The man who knows that a woman does not consent is only guilty of a misdemeanor so long as she does not utter the word “no” and he does not use force or deception. Avoiding what consent is and turning instead to refusal fails to protect the woman who is too afraid to speak up. Indeed, this gap is all the more prominent when one considers that these models likewise apply to sexual contacts. A man who knows that groping a woman on a subway is unwelcome contact will be guilty only of a petty misdemeanor because she did not refuse to consent.<sup>120</sup>

### B. *Is That a “Yes”?*

With the gaps caused by “no means no,” it is no wonder that scholars are advocating for affirmative consent standards. The default is “no.” The defendant must wait for a “yes.”

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<sup>117</sup> State *ex rel.* *M.T.S.*, 609 A.2d 1266 (N.J. 1992). *M.T.S.* also read the force requirement out of the statute, but that is neither here nor there for our purposes.

<sup>118</sup> *Id.* at 1276.

<sup>119</sup> *Id.*

<sup>120</sup> MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.6(2)(c) and (3) (AM. LAW. INST., Discussion Draft No. 2, 2015).

Affirmative consent standards are not simply victim-protecting because they offer clear rules for the morally obtuse. They are purportedly victim-protecting because they prevent a searching inquiry into the victim's state of mind.<sup>121</sup> To the extent that the search for victim consent has been an avenue for unfair exploration and exposure of a victim's sexual past, it is easy to see the benevolent desire to spare a victim from this inquiry. If the only question is what *she said* and not what *she meant*, then say the reformers, we need not delve into the hidden recesses of her mind, but merely look superficially at her actions.

If only that were true. This returns us to the distinction we must draw between words and actions. Some words are like stop lights. They have clear meanings (or at least can be easily stipulated to have legal meanings, such as "I do"). Some actions will also count, such as nodding one's head. But many actions are ambiguous. Moreover, the law of consent is not the law of penetration. It applies to torts. And it applies to intimacies short of sex itself.

Here is a statement I take to be rather uncontroversial: Kissing another person does not unambiguously signify that one wants to have one's rear end grabbed. While Albert may strongly desire that Beatrice grab his rear, Chuck may only desire to kiss Denise and may absolutely not wish to be grabbed in any other way. Conduct can simply be ambiguous as to whether further intimacy is desired. How can Denise know this? She has exactly the same information that Beatrice has.

Indeed, the false promise of affirmative consent standards is readily apparent when one considers the Reporters' exposition of what can count as consent to sexual contacts:

[The proposed Code provision] specifically provides that "words or actions" suffice to communicate positive agreement. To be sure, breathless first kisses or "stealing second" are welcome and cherished parts of many consensual courtship stories, and are not intended to be penalized by the imposition of a consent requirement. The "words or actions" requirement in effect leaves to factfinders the right to differentiate between a "stolen kiss" at the end of a promising date and one stolen, for instance, by a total stranger while in line at the grocery store.<sup>122</sup>

Beyond doubting the empirical support for "stealing second" as a "cherished courtship story" (perhaps because "stealing second" seems to imply unwelcome contact), the Reporters' defense simply highlights the very ambiguity at issue. Context certainly matters, but how do we evaluate conduct that is not intended to

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<sup>121</sup> Anderson, *supra* note 75, at 315 ("Scholars have criticized the traditional focus on subjective consent as tending to put the victim on trial instead of the defendant.").

<sup>122</sup> MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 127 (AM. LAW. INST., Discussion Draft No. 2, 2015).

convey anything? I would suspect that one person kisses another person because he enjoys so doing. This conduct is not, in Evidence lingo, intended as the assertion: “Please grab my rear.” It isn’t even intended as an assertion when the person really wants his rear grabbed! We infer willingness from conduct, but the conduct is not being engaged in so as to confer a message.

Notice then that an affirmative consent standard is not necessarily more victim-protecting than a willed acquiescence standard.<sup>123</sup> After all, if the question is “what sorts of behaviors count as ‘yes’?” then the question is not “did the victim choose to allow this contact to occur?” An affirmative consent standard invites the creation of a social convention by the jury.<sup>124</sup> Will it be “kissing means you want your rear grabbed” or its opposite? Who knows? Are we remotely prepared to designate the exact behaviors that count as affirmative consent to each type of sexual contact? Remember that under an affirmative consent standard the inquiry is not “did the victim want sex” or “did the defendant act reasonably” but rather “do you, the jury, construe this behavior as meaning ‘yes’?” Indeed, anyone who rejects my view that consent is an internal state and instead opts for the view that consent is a performative must recognize that this means the woman will not be the final determiner of the meaning of her actions. If the law decides that wearing a short skirt is consent, then it is consent. If you think that is wrong—and you think that is wrong because women may want to wear skirts but not have sex—then that is because you think that it is what the woman subjectively chooses that matters.

This means that we should be concerned about any view of consent that does not allow the meaning to be determined by the speaker. If we don’t think that short skirts mean “yes” or getting married means “yes”—if we want each consenter to have the freedom to decide which contacts he or she will allow—then the consenter ought to have the final say on how his or her actions are interpreted.

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<sup>123</sup> See also Dressler, *supra* note 36, at 427. Dressler argues in favor of “no means no” and against searching affirmative consent standards because searching inquiries into the victim’s behavior may not be victim-protective:

[An affirmative consent standard] hardly makes life easier for the complainant at the criminal trial. In the absence of a straightforward “yes” or “no,” the parties will have to explicitly describe the sexual events of the evening, right down to every minute and embarrassing detail. The issue will not be whether the male threatened to hurt the female, punched her, or threw her down on the ground, nor will the evidence focus on her screams, cries for help, or her efforts to push him off of her, all of which demonstrate lack of consent. Such testimony is traumatic for the crime victim...but testimony by the woman about how she resisted the male is far less embarrassing than the type of testimony we can expect to see in the new [affirmative consent] world, where the male will testify to every nuance in the female’s behavior, all for the purpose of showing that the complainant gave permission, if not in words then in action.

*Id.* at 427.

<sup>124</sup> Cf. Douglas N. Husak & George C. Thomas III, *Date Rape, Social Convention, and Reasonable Mistakes*, 11 LAW AND PHIL. 95 (1992) (noting that under social conventions prevalent at the time women tended to engage in nonverbal behavior to indicate consent and refusal, behavior that would require reasonable men to rely on social conventions to ascertain the woman’s willingness).

After all, recall that we can still protect the defendant against misinterpretation by relying on a mens rea standard.<sup>125</sup>

However, to rely on what the consentor meant to convey by his actions is really to give up the game. Because once we need to figure out what he was thinking, what he was feeling, what he wanted, and the like, then we cannot avoid inquiring into questions that look beyond the objective indicia of the situation. Given that conduct is prone to ambiguity and interpretation, the only way to make sure that we set clear consent standards may be then to stipulate the exact sorts of conduct that “count” as a yes or a no. Indeed, Anderson proposes a negotiation model that requires talking because affirmative consent models that rely on conduct can devolve into a “no” model.<sup>126</sup>

These concerns are not hypothetical and bad drafting is rampant. Consider Princeton University’s equivocation on the definition of affirmative consent:

In reviewing possible violations of sexual misconduct, the University considers consent as the voluntary, informed, un-coerced agreement through words and actions freely given, which a reasonable person would interpret as a willingness to participate in mutually agreed-upon sexual acts. Consensual sexual activity happens when each partner willingly and affirmatively chooses to participate.<sup>127</sup>

The first and second sentences set forth very different standards for affirmative consent. The first sentence allows the determination to turn on what a reasonable person would interpret as willingness. The second sentence turns on what the putative victim truly chooses. The multiple layers here—of what the victim wants, how she behaves, what her behavior indicates about her desires, and what a reasonable person would take her behavior to mean—create layers of ambiguity and confusion.

It seems that the only solution that is going to give affirmative expression proponents the clarity they desire is a shift to a more exacting verbal expression such as Anderson’s. But such a solution comes at a steep price as these regulations would stand in stark departure to how individuals actually negotiate sexual contacts. Requirements of express verbal discussion will succeed in clarifying what is required, but with two possible repercussions and a third complication. First, the law will more significantly deviate from what individuals do. Second,

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<sup>125</sup> Larry Alexander points out another difficulty which is that if we are to take consent to be a speech act performative the actor must understand her conduct as an instantiation of that performative. See Alexander, *supra* note 31, at 103–04 (speech acts has an implicit mental requirement that the actor understands that she is engaging in a performative).

<sup>126</sup> Anderson, *supra* note 52, at 1405 (“When things heat up, then, the Yes Model melts into the No Model, in which silence constitutes consent.”).

<sup>127</sup> *Rights, Rules and Responsibilities*, PRINCETON UNIV., <http://www.princeton.edu/pub/rrr/part1/> (last visited Apr. 14, 2016).

ethically well-disposed actors can be caught within the web of a law about which they have no notice. And third, we are still left at sea with what to do about contacts short of intercourse, as even Anderson does not advocate that negotiation is required for sexual contact.

### C. Grading and Conflating

It may be that affirmative consent standards are here to stay, and that as they are adopted across campuses, the criminal law will follow suit. If so, the criminal law must consider how to grade those instances in which a defendant engages in sexual contact in the absence of affirmative consent.

Let us begin by supposing that individuals who proceed in the face of a “no” or the absence of a “yes” are acting negligently vis-à-vis the victim’s underlying willingness to engage in intercourse. Those who do think negligence is culpable must face a separate hurdle and that is one of grading. Assume that the defendant is negligent—she thinks that a “no” can mean “yes” but it is unreasonable for her to so think. The further question is how culpable the defendant is for proceeding in the face of the “no.”

Typically, we expect criminal codes to grade offenses by taking into account the defendant’s culpability. Roughly, a person who kills purposefully is worse than one who kills recklessly is worse than one who kills negligently.<sup>128</sup> Hence, if a defendant violates a negligence per se rule, we ought to expect that the crime be graded on par with negligence crimes.

The problem, however, is that the defendant—who knows he does not have a “yes”—appears to be acting knowingly. After all, he is purposefully having intercourse and he knows he does not have a “yes.” Hence, the negligence per se standard is masked.

One reaction to the concern that these models will overstate the culpability of negligent actors is to reduce the penalty. However, then the statute will understate some defendants’ blameworthiness, and understate it significantly. That is, if we set the penalty lower for violation of the “yes means yes” model, then defendants who proceed in the face of silence with full awareness of the victim’s lack of acquiescence will be under-punished.

Imagine Dan who is on his third date with Dana. Dan is a serial date rapist who preys on women whom he knows will not resist his advances. Indeed, he picks his victims and tailors his conduct to produce frozen fright. He is aggressive in his foreplay so that by the time that he approaches penetration he has signaled to his victim that he will not take “no” for an answer. His victims almost always simply freeze.

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<sup>128</sup> *But see* ALEXANDER & FERZAN, *supra* note 12, ch. 2 (arguing that purpose and knowledge collapse into recklessness).

Dan does not have affirmative consent. However, if affirmative consent is used in conjunction with other formulations (perhaps aggravations for force, threats, and the like), then actors such as Dan may be punished too lightly. He may intend to have nonconsensual sexual intercourse and yet his action is treated as on par with individuals who may truly believe that their victims are willing to have sex with them. The trouble with affirmative consent models, then, is that to grade them appropriately to the negligent, they will vastly under-punish the culpable. Conversely, to punish the culpable proportionally, the model risks over-punishing the negligent.

Not only then will the criminal law inappropriately grade one level or the other, but it will conflate two divergent levels of culpability. If Albert believes that Betty is not saying “yes” because she is unwilling and Carl believes Dana is not saying “yes” because she wants to appear coy, then Albert and Carl both act knowingly vis-à-vis their victims’ lack of affirmative consent. But, Albert acts knowingly vis-à-vis his victim’s underlying acquiescence whereas Carl acts only negligently vis-à-vis that underlying acquiescence. However, because this latter mental state is irrelevant, both Albert and Carl will seem to commit the same crime, subject to the same amount of punishment. Hence, this model fails to distinguish between actors of differing culpability.

This potential disparity is all the more problematic when we consider “no means no” rules. Most men understand that “no means no.” Thus, they know the victim does not acquiesce. These individuals should go to jail for a long time. They should be punished as felons. Indeed, even those who consciously disregard the risk that “no” truly meant “no,” should be subject to extreme sanction. They’re rapists.

The criminal law typically delineates between these sorts of actors and negligent ones. Even if a legislator wishes to punish Berkowitz, even if the defendants in *Morgan* were (in the light most favorable to them) absurdly unreasonable, their crimes ought to be graded as negligent crimes.

Hence, if we punish the negligent appropriately or we provide lesser sanctions so as to gently nudge and unstick the norm,<sup>129</sup> we simultaneously fail to condemn egregious criminal behavior deserving of a substantial criminal sanction. Taking rape seriously is not simply a matter of worrying about punishing the innocent; it is also a matter of appropriately punishing the guilty.

A final potential concern about grading is the problem of over-inclusive rules. Unlike the other problems presented, which any code drafter must take seriously in order to achieve a just and fair law of sexual assault, I take this argument to be of more scholarly interest. Or to put the point another way, the additional concern I now raise, I take to be a real concern, but it is a pervasive problem throughout the

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<sup>129</sup> Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 624 (2000) (suggesting the possibility of slight punishments to unstick norms instead of hard shoves the create resistance).

criminal law, and may ultimately be unavoidable. This is the problem of how to articulate what a just punishment is for someone whose only wrongdoing is the knowing violation of an over-inclusive rule.

What do I mean by this? Let's return to the red light. Imagine you are someone in the Midwest. The land is flat. You can see for miles. There is not another car in sight. And the light is red. Will you run it?

As Fred Schauer has explicated, rules are over-inclusive.<sup>130</sup> They will cover cases that go beyond their background justification. Here, red lights are important for safety. But in this case, you know that there is no reason to wait for the green. No reason except that the law says you should (and maybe there is a traffic camera that will enforce that law!).

Retributivists who believe that individuals should only be punished for wrongdoing and/or culpability are particularly troubled by over-inclusive rules. If a woman acquiesces and the man correctly assesses that, should he be punished because she did not say "yes"? (Return, perhaps to the alarm clock example.) He has not wronged her or attempted to wrong her. But if he knows the law says to get a "yes" and he fails to, should he be punished? And, even if he should be punished for undermining rule of law values, should he be punished the same as individuals who engage in sexual intimacies with women who not only did not say "yes" but also did not acquiesce? Again, this presents a grading problem for the violation of over-inclusive rules that is ubiquitous. Still, one ought to worry whether prophylactic rules in the sexual assault context might be broader or more over inclusive than the run of the mill criminal statute. Even if not, the worry about appropriate punishment remains.

#### *D. An Affirmative Defense?*

To this point, I have argued that adopting affirmative expression models have the potential to punish the morally innocent, or at the very least, the negligent. I have also maintained that this problem is compounded by the fact that ignorance of the law is not an excuse. It is one thing to try to change drunk driving laws while simultaneously adopting a sweeping public campaign. It is another thing for the criminal law to alter the text of a statute and cross its fingers that word will get out.

Criminal law theorists teach what they deem to be less than ideal laws every day. And so, one question is whether the best thing to do is simply to stomp one's feet and gripe or whether the best move at this point is to offer a potential compromise solution. Despite my deep reservations about affirmative expression models, here is a potential compromise. Although I believe the criminal law ought to require true recklessness as to lack of assent, I would urge, at a minimum, that an affirmative defense be created if affirmative expression models are going to be used. Allowing a defense for honest (or honest and reasonable) beliefs and shifting

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<sup>130</sup> SCHAUER, *supra* note 76, at 32–39.

the burden to the defendant would lessen the impact of this over-inclusive law as a code seeks to shift social norms.

As Larry Alexander and I have argued, when the law creates proxy crimes, and is thus over-inclusive, one way to reconcile the need for a legal rule with the desire to do justice in individual cases is to allow the defendant to show that the rule ought not apply in his case.<sup>131</sup> Constitutionally, rules cannot simply be framed as mandatory rebuttable presumptions.<sup>132</sup> That is, if something is an element of the offense, it is unconstitutional to shift the burden to the defendant to disprove it. However, given the Court's formalist reasoning, so long as a statute is properly constructed, the same thing may be accomplished with an affirmative defense.<sup>133</sup> If "no means no" simply means that "no" renders it impermissible to proceed with sex, such that consent as willed acquiescence is no longer an element of the crime, then there is nothing to stop a clever legislator from adopting a provision that "it is an affirmative defense to nonconsensual intercourse for the defendant to show that he honestly believed the victim willingly acquiesced on this occasion despite the utterance of the word, 'no.'" This affirmative defense could then be proven by the defendant by a preponderance of the evidence.

To be clear, I do not endorse this provision.<sup>134</sup> I think a just criminal law would require the prosecution to prove that the victim did not willingly acquiesce and that the defendant consciously disregarded that risk. The criminal law should only punish culpable behavior, and the state should have to prove every aspect of that culpability beyond a reasonable doubt. Still, an affirmative defense would make an affirmative expression provision less unjust than such a provision without a defense.

## V. ARE COLLEGES DIFFERENT?

The rampant adoption of affirmative consent models across colleges and universities leads to the question of whether all the concerns that apply to the criminal law apply with equal force to rules promulgated in compliance with Title IX. I am extremely skeptical that provisions with low burdens of proof, inadequate

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<sup>131</sup> ALEXANDER & FERZAN, *supra* note 12, at 308–09.

<sup>132</sup> *Sandstrom v. Montana*, 442 U.S. 510 (1979).

<sup>133</sup> *Patterson v. New York*, 432 U.S. 197 (1977).

<sup>134</sup> Indeed, I have expressed vehement opposition to burden-shifting on consent on a prior occasion. See Kimberly Kessler Ferzan, *A Reckless Response to Rape: A Reply to Ayres and Baker*, 39 U.C. DAVIS. L. REV. 637, 658–59 (2006). In that article, I claim that burden shifts are unconstitutional, while noting the existing Supreme Court jurisprudence might allow the shift depending upon how the elements are formulated. *Id.* at n.115. To be clear, then, my views on consent and my views on how burden of proof ought to work, both yield that this affirmative defense is morally and constitutionally unfair and inappropriate. But worse still would be to have these consent laws enacted without the affirmative defense.



representation, and minimized hearings will ultimately be deemed constitutional.<sup>135</sup> And I am additionally wary as the naming and shaming symptomatic of the criminal law begins to attach to these findings, including, for example, the laws in New York and Virginia that require colleges to designate on a student's transcript if he was suspended or expelled for sexual violence (under campus regulations in which, mind you, "sexual violence" includes the touching of someone's clothed buttocks).<sup>136</sup> Still, the question for today is simply is affirmative consent as bad at the college level? The bottom line is this: Affirmative consent may be less problematic in some cases, but it is hardly the panacea to what ill's our college campuses.

Here is what campuses can do that criminal law cannot. It can provide notice. Whether it tells students not to plagiarize or how to conduct sexual activities as its student, colleges can notify and enforce rules. They can include the materials in their orientation programs, hold dormitory meetings, and make sure that students know that affirmative consent is required.

More generally, undergraduate institutions are ideal places for setting norms on how to treat each other. When, for instance, the University of Virginia views itself as "Mr. Jefferson's University," it requires its students to go beyond the bare minimum of decency. It fairly sets the norms of membership within its community.

Before applauding such a result, it is important to keep in mind that though campus rape has dominated the public's attention, noncollege students are 1.2 times more likely to be sexually assaulted than their college counterparts.<sup>137</sup> Solving rape on college campuses may be our focus, but it is only half the problem for women ages 18–24. And those women who are not on college campuses may have less access to resources and support than do their college counterparts.

Moreover, there are reasons to be skeptical of whether affirmative consent standards can be successful even on campus. First, these provisions are absurdly sweeping. They bar not only sex but sexual contacts.<sup>138</sup> They cover not only students but also faculty. They include not just first encounters but also married

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<sup>135</sup> See, e.g., Teresa Watanabe, *Ruling in favor of UC student accused of sex assault could ripple across U.S.*, L.A. TIMES (Jul. 15, 2015, 4:00 AM), <http://www.latimes.com/local/education/la-me-ucsd-male-student-20150715-story.html#page=1>.

<sup>136</sup> Jake New, *Requiring a Red Flag*, INSIDE HIGHER ED (Jul. 10, 2015), <https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges-note-sexual-assault-responsibility-student-transcripts>. Here, the motivation for the legislation is admirable. In Virginia, Jesse Matthew was able to transfer between institutions without any indication of previous findings.

<sup>137</sup> SOFI SINOZICH AND LYNN LANGTON, U.S. DEPARTMENT OF JUSTICE SPECIAL REPORT: RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, 1 (2014), <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

<sup>138</sup> Some theorists are explicitly aware that norms for penetration cannot identically apply to sexual contacts. See, e.g., Anderson, *supra* note 52, at 1422 (restricting the Negotiation Model to penetrative acts).

couples. Each of these provisions is perfectly appropriate in isolation. But when you put them together these provisions would bar an assistant professor living in University housing from pinching her husband's buttock without his first having said "yes."<sup>139</sup> One might take this example to be "cartoonish," but when the plain terms of a regulation cover the conduct, we are then relying on "prosecutorial discretion" to protect us. When regulations can be more narrowly drafted, that is certainly the better course.

More importantly, affirmative consent standards do not solve the greatest challenge to our college campuses which is the intoxicated "yes." Besides the general irony that a liberal agenda will ultimately lead to the endorsement of profoundly conservative values,<sup>140</sup> there is simply the question of whether any regulatory body is remotely equipped to adjudicate these cases. The proposed Model Penal Code does not criminalize any of this behavior. The drafters believe that intoxicated "yes's" count. Sex with an intoxicated person who says "yes" is punished only if the intoxicants were purposely surreptitiously administered by the defendant. A "yes" is all that is needed no matter how blitzed out of her mind the victim may be. "[I]t is not merely difficult but rather metaphysical and largely quixotic to attempt to distinguish such cases from the many in which alcohol influences behavior that the intoxicated person genuinely accepts."<sup>141</sup> Even those of us who do not shy away from metaphysical questions in criminal law can see the concern here. Because college students drink and "hook up" with perhaps more frequency than they attend class, it is the intoxication problem, not the affirmative consent problem that warrants further thought.

Finally, if we want to instill different norms for sexual consent and to reach broader populations, then college is simply too late. A 2014 study found that nearly half of all high school students reported having engaged in sexual intercourse.<sup>142</sup> College students can only do calculus because they learned to add in elementary school. Shifting the social norm requires paying attention to teaching individuals to negotiate sex from the very beginning.<sup>143</sup>

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<sup>139</sup> I am addressing the perfect storm of sexual contact provisions, intimate relationships, and affirmative consent standards in a current work in progress.

<sup>140</sup> See Heather MacDonald, *Neo-Victorianism on Campus: Is this the end of the collegiate bacchanal?*, THE WEEKLY STANDARD (October 20, 2014), [http://www.weeklystandard.com/articles/neo-victorianism-campus\\_810871.html](http://www.weeklystandard.com/articles/neo-victorianism-campus_810871.html).

<sup>141</sup> MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 67 (AM. LAW. INST., Discussion Draft No. 2, 2015).

<sup>142</sup> KAISER FAMILY FOUND., *supra* note 53, at 1.

<sup>143</sup> For the argument that rape should be seen as a public health problem that ought to be prevented, see Margo Kaplan, *Rape Beyond Crime*, 66 DUKE L.J. (forthcoming 2017).

## VI. CONCLUSION

Consent models play a central role in recognizing and vindicating the victim's autonomy in choosing who will touch her and under what conditions. But consent formulations do not operate in a vacuum. Rather, different formulations impact what culpability a code or regulation is explicitly or implicitly requiring. The criminal law has and should continue to take seriously that only those with a guilty mind should be subject to criminal sanction. Accordingly, affirmative consent standards ought to be adopted with care and attention to their potential to punish actors without due regard for their culpability.